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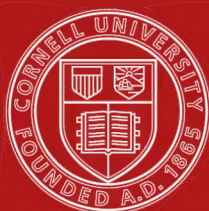
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THE LAW OF FIRE INSURANCE

BY
GEORGE A. ^{usel}CLEMENT

OF THE NEW YORK BAR

EDITOR OF THE NEW YORK ANNOTATED CODE OF CIVIL PROCEDURE AND
FIRE INSURANCE DIGEST

IN TWO VOLUMES.

VOL. I

AS A VALID CONTRACT IN EVENT OF FIRE AND ADJUST-
MENT OF CLAIMS THEREUNDER.

VOL. II

AS A VOID CONTRACT, AND IN BOTH VOLUMES THE
CONDITIONS OF THE CONTRACT AS AFFECTED
BY CONSTRUCTION, WAIVER, OR ESTOPPEL.

INCLUDING

MISCELLANEOUS PROVISIONS, AND AN ANALYSIS AND
COMPARISON OF THE VARIOUS STANDARD FORMS,
ALL REDUCED TO RULES, WITH THE RELE-
VANT STATUTORY PROVISIONS OF
ALL THE STATES.

VOL. II.

NEW YORK
BAKER, VOORHIS & COMPANY

1905

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PREFACE—Vol. 2.

This volume completes the treatment of the subject of fire insurance, taking as a basis the conditions of the standard forms or of the contract specifically declaring the agreement to be void, and adding a separate chapter covering the miscellaneous provisions and other matters not elsewhere treated.

The same plan is followed as in the first volume, and the two volumes together furnish a convenient, practical, and useful means of comparing and ascertaining the fundamental rules and principles now governing the special subject in all parts of the United States, and the difference of opinion, if any, among the judges or courts. The rules under the special provision or condition which may be under consideration as affected by construction, waiver, or estoppel, read in connection with the rules under the chapter or title "Agents," together with the general rules under "Construction" and "Waiver or Estoppel" in the first volume, and the statutory provisions of the particular State, will demonstrate the practical value of the entire work.

There is a separate index to each volume, and a combined index to both volumes. These, together with the table of contents preceding each volume, will afford a ready means of reference to what may be desired.

The first volume has been revised, altered, and reprinted, so that both volumes are now up to date. The cases and statutes have been inserted in both volumes as published or amended to about the 15th of August, 1905.

Attention is called to the preface to the first volume as reprinted where the general plan and scope of the entire work is more fully explained.

NEW YORK, *September*, 1905.

GEORGE A. CLEMENT.

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FIRE INSURANCE

AS A

VOID CONTRACT AND AS AFFECTED BY CON-
STRUCTION AND WAIVER OR ESTOPPEL, AND
MISCELLANEOUS PROVISIONS CONTAINED
THEREIN OR CONNECTED THEREWITH,
REDUCED TO RULES.

CHAPTER FIRST.

Concealment.

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When chargeable with intentional concealment.
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RULE I.

As Imposed by Contract.

This entire policy shall be void if the insured has concealed, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof.

This rule is imposed, by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin,
New Jersey,	

The South Dakota form provides: "This policy shall be void if any material fact or circumstance concerning the risk has been, or the amount of loss shall be, fraudulently concealed by the insured."

By the standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire,

there is no provision as to concealment.

In the States where no standard form is prescribed, the New York standard form is in general use.

It would seem that concealment by the insured as to any material matter relating to the insurance may void the policy, independent of any specific provision therein.

Armour v. Transatlantic Ins. Co., 90 N. Y. 450, 455; *Clark-*

*The statute under which the Pennsylvania legislature authorized the adoption of the standard form was held by the Supreme Court of that State to be unconstitutional. *O'Neill v. American Ins. Co.*, 166 Pa. St. 72, 30 Atl. Rep. 943. Notwithstanding, the New York standard form continues in general use in that State.

See Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 1.

son *v.* Western Assur. Co., 33 App. Div. 23, 53 N. Y. Supp. 508; Evans *v.* Columbia Ins. Co., 40 Misc. 316, 81 N. Y. Supp. 933; Daniels *v.* Hudson River Ins. Co., 66 Mass. 416; Clark *v.* Union Ins. Co., 40 N. H. 333.

See Rule 4.

RULE 2.

Effect of no Written Application and no Inquiry — When Chargeable with Intentional Concealment.

Policy may be issued by the insurance company without any written application therefor, or without any inquiry being made of the assured as to matters considered material by the company, and when it is issued under such circumstances, the insurance is not rendered void by the fact that the insured did not voluntarily disclose material facts, unless he intentionally or fraudulently concealed them;¹ to be charged with the intentional concealment of a material fact, the assured must know or have reason to know that the fact is material or that the information was required by the company.²

1. Johnson *v.* Scottish Union & National Ins. Co., 93 Wis. 223, 67 N. W. Rep. 416, 46 Ins. L. J. 59; Sanford *v.* Royal Ins. Co., 11 Wash. 653; Lancashire Ins. Co. *v.* Monroe, 101 Ky. 12, 39 S. W. Rep. 434. And see Commonwealth *v.* Hide & Leather Ins. Co., 112 Mass. 136; Washington Mills *v.* Weymouth Ins. Co., 135 Mass. 503; Gates *v.* Madison Ins. Co., 5 N. Y. 469; Clark *v.* Union Ins. Co., 40 N. H. 333; Hartford Ins. Co. *v.* Harmer, 2 Ohio St. 452; Cleavenger *v.* Franklin Ins. Co., 47 W. Va. 595, 35 S. E. Rep. 998.

2. American Gold Stamping Co. *v.* Glens Falls Ins. Co., 1 Misc. 114, 20 N. Y. Supp. 646; Clarkson *v.* Western Assur. Co., 33 App. Div. 23, 53 N. Y. Supp. 508; Arthur *v.* Palatine Ins. Co., 35 Oreg. 27, 57 Pac. Rep. 62, 28 Ins. L. J. 545; Browning *v.* Home Ins. Co., 71 N. Y. 508; Little *v.* Phoenix Ins. Co., 123 Mass. 380; Green *v.* Merchants' Ins. Co., 10 Pick. 402 (Mass.); Bebee *v.* Hartford Ins. Co., 25 Conn. 51; American Central Ins. Co. *v.* Nunn, Tex. Civ. App., 79 S. W. Rep. 88.

RULE 3.**Oral Application Without Inquiry — Waiver — Exception.**

When policy is issued on an oral application, and no inquiry is made by company's agent, and no representations by the assured, it must appear not only that the matter concerning which the insurer had no information was material to the risk, but also that it was intentionally and fraudulently concealed by the insured. Mere failure or neglect to make known, without inquiry, facts which the insurer may regard as material to the risk, is not concealment within the meaning of the policy, because the assured has the right to assume that the insurer will make proper inquiry in reference to such matters as it may deem material to the risk, and that it waives knowledge as to all other matters, except, possibly, in reference to unusual or extraordinary circumstances within the knowledge of the assured, but of which there is nothing to put the insurer upon inquiry.

Arthur v. Palatine Ins. Co., 35 Oreg. 27, 57 Pac. Rep. 62, 28 Ins. L. J. 545. And see *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278; *Cleavenger v. Franklin Ins. Co.*, 47 W. Va. 595, 35 S. E. Rep. 998.

RULE 4.**When Insured Bound to Make Disclosure Though no Inquiry is Made — Concealment not Assumed.**

A contract of insurance is one which requires perfect good faith upon the part of the insured upon whom the obligation rests, not to suppress any facts and circumstances material to the risk which would mislead the

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company, and thereby induce it to assume a risk which it would not assume if such facts and circumstances were disclosed. Any circumstances evidently and materially enhancing the risk of fire, known to the applicant at the time of insuring and not so, or presumed to be so, to the insurer, and of which he is not bound to inform himself, or to take the risk of it, must be disclosed, though no inquiry is made respecting it.¹ Concealment will not be assumed and must be shown or established.²

1. *Clarkson v. Western Assur. Co.*, 33 App. Div. 23, 53 N. Y. Supp. 508. And see *Mechanics' Ins. Co. v. Hodge*, 46 Ill. App. 479; *Hayes v. United States Ins. Co.*, 132 N. C. 702, 44 S. E. Rep. 404.

2. *Greenlee v. Hanover Ins. Co.*, 104 Iowa, 481, 73 N. W. Rep. 1050.

RULE 5.

Effect of Defective Written Application.

There can be no concealment predicated on an unanswered question in a written application, accepted by the insurance company,¹ or if in making inquiries, the company does not question the insured upon the specific matter,² or as to matter not covered by an incomplete, ambiguous, or uncertain answer.³

1. *Parker v. Otsego Ins. Co.*, 47 App. Div. 204, 62 N. Y. Supp. 190, aff'd, 168 N. Y. 655, without opinion.

2. *Short v. Home Ins. Co.*, 90 N. Y. 16.

3. *Clawson v. Citizens' Ins. Co.*, 121 Mich. 591, 80 N. W. Rep. 573.

RULE 6.

No Concealment When Company Has Knowledge or is Put upon Inquiry.

Concealment cannot be founded upon a fact as to which the insurance company had notice or knowledge, or as to which it was put upon inquiry.

Parker v. Otsego County Ins. Co., 47 App. Div. 204, 62 N. Y. Supp. 199, aff'd, 168 N. Y. 655, without opinion; *Cowell v. Phoenix Ins. Co.*, 126 N. C. 684, 36 S. E. Rep. 184; *Liverpool, L. & G. Ins. Co. v. Davis*, 56 Nebr. 684, 77 N. W. Rep. 66; *National Ins. Co. v. United States Loan Assoc.*, 54 S. W. Rep. 714 (Ky.). And see *German-American Ins. Co. v. Norris*, 100 Ky. 29, 37 S. W. Rep. 267, 26 Ins. L. J. 384; *Strauss v. Phoenix Ins. Co.*, 9 Colo. App. 386, 48 Pac. Rep. 822, 26 Ins. L. J. 676; *Bebee v. Hartford Ins. Co.*, 25 Conn. 51; *Carter v. Boehm*, 1 W. Black. 593; *Keith v. Globe Ins. Co.*, 52 Ill. 518; *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520; *Gahagan v. Union Ins. Co.*, 43 N. H. 176.

RULE 7.

Effect of Insured's Knowledge of Material Fact.

If circumstances are such as to charge the insured with knowledge of material facts, the obligation may rest upon him to disclose them,¹ he cannot escape the consequences of failing to perform such obligation by claiming that it was through inadvertence or neglect, or without intent to defraud,² and same principle applies to contracts of reinsurance.³ There is no concealment unless the fact is known to the insured, though it may be misrepresented.⁴

1. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. Rep. 77, 20 Ins. L. J. 481; *Boggs v. America Ins. Co.*, 30 Mo. 63; *Dennison v. Thomaston Ins. Co.*, 20 Me. 125; *Walden v. Louisiana Ins. Co.*, 12 La. 134; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411 (Ky.); *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 118.

2. *Dennison v. Thomaston Ins. Co.*, *supra*; *Bebee v. Hartford Ins. Co.*, 25 Conn. 51; *Bufe v. Turner*, 6 Taunt. 338, 1 E. C. L.

643; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535 (Mass.); *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Hayes v. United States Ins. Co.*, 132 N. C. 702, 44 S. E. Rep. 404.

3. *New York Bowery Ins. Co. v. New York Ins. Co.*, 17 Wend. 359.

4. *North British & M. Ins. Co. v. Union Stockyards Co.*, Ky. , 87 S. W. Rep. 285.

RULE 8.

Must be Material — Question of Fact or Law — Burden of Proof.

The fact claimed to have been concealed must be material.¹ The question of materiality is one of fact to be determined by a jury,² unless there is no conflict in the evidence, or materiality is obvious, it may present only a question of law to be determined by the court.³ The burden of establishing materiality rests upon the insurance company.⁴

1. *McCarty v. Imperial Ins. Co.*, 126 N. C. 820, 36 S. E. Rep. 284; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. Rep. 434; *Bonnet v. Merchants' Ins. Co.*, 42 S. W. Rep. 316 (Tex. Civ. App.); *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Virginia Ins. Co. v. Kloeber*, 31 Gratt. 749 (Va.); *Clark v. Manufacturers' Ins. Co.*, 8 How. 235 (U. S.).

2. *Caplis v. American Ins. Co.*, 60 Minn. 376, 62 N. W. Rep. 440, 24 Ins. L. J. 551; *State Ins. Co. v. Du Bois*, 7 Colo. App. 214, 44 Pac. Rep. 756; *Sexton v. Montgomery Ins. Co.*, 9 Barb. 191; *Gates v. Madison Ins. Co.*, 2 N. Y. 43, subsequent appeal, 5 N. Y. 469; *People v. Liverpool, L. & G. Ins. Co.*, 2 T. & C. 268 (N. Y.); *Virginia Ins. Co. v. Kloeber*, 31 Gratt. 749 (Va.); *Tyler v. Ætna Ins. Co.*, 12 Wend. 507; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507 (U. S.); *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Franklin Ins. Co. v. Coates*, 14 Md. 285.

3. *Springfield F. & M. Ins. Co. v. Phillips*, 16 Ky. L. R. 390; *Ryan v. Springfield Ins. Co.*, 46 Wis. 671; *Firemen's Fund Ins. Co. v. McGreevy*, 118 Fed. Rep. 415, 55 C. C. A. 543.

4. *State Ins. Co. v. Du Bois*, *supra*.

RULE 9.

Test of Materiality — Effect of Inquiries.

The test of materiality of a fact suppressed or concealed is whether the fact increases the risk of fire, or would have induced the insurer to decline the risk¹ unless the policy by its express terms or specific provision makes the fact material² in which case it precludes inquiry upon the subject, and the question of materiality ceases to be one of fact,³ and materiality may be established also as matter of law by the fact that the insurance company made inquiries of the insured before it issued the policy.⁴

1. *Loehner v. Home Ins. Co.*, 17 Mo. 247, 19 Mo. 628; *Boggs v. American Ins. Co.*, 30 Mo. 63; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. Rep. 77. And see *Clark v. Manufacturers' Ins. Co.*, 8 How. 235 (U. S.).

2. *Gahagan v. Union Ins. Co.*, 43 N. H. 176; *Beck v. Hibernia Ins. Co.*, 44 Md. 95; *Gerhauser v. N. B. & M. Ins. Co.*, 7 Nev. 174. And see *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; *Guin v. Phoenix Ins. Co.*, 31 S. W. Rep. 566 (Tex. Civ. App.).

3. *Gerhauser v. N. B. & M. Ins. Co.*, 7 Nev. 174.

4. *Mullin v. Vermont Ins. Co.*, 54 Vt. 223, 56 Vt. 39, 58 Vt. 113.

RULE 10.

Evidence as to Rate of Premium.

The rate of premium charged or what would have been charged if facts were known, is relevant evidence on a question of materiality;¹ but is not conclusive, as materiality is still proper to be determined by a jury.²

1. *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507 (U. S.); *Insurance Co. v. Chase*, 5 Wall. 509 (U. S.); *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504 (U. S.); *New York Bowery Ins. Co. v. New York Ins. Co.*, 17 Wend. 359; *Wytheville Ins. Co. v.*

Stultz, 87 Va. 629, 13 S. E. Rep. 77, 20 Ins. L. J. 481; Boggs v. America Ins. Co., 30 Mo. 63.

2. See preceding cases, also Rule 8.

RULE 11.

Concealment by Insured's Agent or Broker.

The concealment of a material fact by an agent or broker of the insured, employed to procure insurance, and in course of his employment, is the concealment of the insured.

Hamblet v. City Ins. Co., 36 Fed. Rep. 118. And see Ruggles v. Ins. Co., 12 Wheat. 408.

RULE 12.

Effect of Concealment by Owner Acting as Agent for Mortgagee.

When the owner and insured acts also as agent for a mortgagee to whom the loss is made payable, and in obtaining the insurance is guilty of an intentional or fraudulent concealment, it voids the policy as to both, notwithstanding a mortgagee clause was added or attached.

Hanover Ins. Co. v. National Exchange Bank, 34 S. W. Rep. 333, 25 Ins. L. J. 475 (Tex. Civ. App.).

See also Vol. 1, Fire Insurance as a Valid Contract, "Mortgagor and Mortgagee."

RULE 13.

Withholding Information as to Interest or Title — Question of Fact — Effect of a Warranty.

In the absence of inquiry by the insurance company, the innocent withholding of information or failure to state the facts in regard to interest or title, by the insured, does not, as matter of law, constitute a material

concealment;¹ nor does the omission by the insured to disclose the existence of a lien or a mortgage,² but if the insured knows or has reason to know that the facts not made known by him are or may be material, and the concealment is thus affected by both his knowledge and intention, the condition is operative.³ The question of a concealment of material facts in connection with these, as with other matters relating to the insurance, is one of fact proper to be submitted to a jury,⁴ and there may be such a concealment of a mortgage as to void the policy,⁵ specially when the insured has warranted that he has not omitted to state any information material to the risk.⁶

1. *Johnson v. Scottish Union & National Ins. Co.*, 93 Wis. 223, 67 N. W. Rep. 416, 26 Ins. L. J. 59; *Seal v. Farmers' Ins. Co.*, 59 Nebr. 253, 80 N. W. Rep. 807; *Boulware v. Farmers' Ins. Co.*, 77 Mo. App. 639; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 37 N. E. Rep. 460, 23 Ins. L. J. 624, aff'g 51 Ill. App. 252; *Merchants' Ins. Co. v. Bonnet*, 48 S. W. Rep. 1110, Tex. Civ. App. . And see prior appeal, 42 S. W. Rep. 316; *Mechanics & Traders' Ins. Co. v. Floyd*, 49 S. W. Rep. 543 (Ky.); *Essex Savings Bank v. Meriden Ins. Co.*, 57 Conn. 335, 17 Atl. Rep. 930; *Hill v. Lafayette Ins. Co.*, 2 Mich. 476.

2. *Light v. Ins. Co.*, 105 Tenn. 480, 58 S. W. Rep. 851; *Arthur v. Palatine Ins. Co.*, 35 Oreg. 27, 57 Pac. Rep. 62; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. Rep. 434; *American Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. 114, 20 N. Y. Supp. 646; *Mascott v. First National Ins. Co.*, 69 Vt. 116, 37 Atl. Rep. 255; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 11 Ins. L. J. 125; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Crittenden v. Springfield F. & M. Ins. Co.*, 85 Iowa, 652, 52 N. W. Rep. 548; *Cleavenger v. Franklin Ins. Co.*, 47 W. Va. 595, 35 S. E. Rep. 998.

3. *American Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. 114, 20 N. Y. Supp. 646; *Johnson v. Scottish Union & National Ins. Co.*, 93 Wis. 223, 67 N. W. Rep. 416, 26 Ins. L. J. 59; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. Rep. 434; *Boulware v. Farmers' Ins. Co.*, 77 Mo. App. 639; *Arthur v. Palatine Ins. Co.*, *supra*.

4. *Mascott v. First National Ins. Co.*, 69 Vt. 116, 37 Atl. Rep. 255; *Franklin Ins. Co. v. Coates*, 14 Md. 285; *Mutual Ins. Co. v. Deale*, 18 Md. 26; *Insurance Co. v. Chase*, 5 Wall. 509 (U. S.); *Williams v. Buffalo German Ins. Co.*, 17 Fed. Rep. 63, 12 Ins. L. J. 374; *Phoenix Ins. Co. v. Coomes*, 20 S. W. Rep. 900, 22 Ins. L. J. 155 (Ky.). And see *MacKinnon v. Mutual Ins. Co.*, 89 Iowa, 170, 56 N. W. Rep. 423, 23 Ins. L. J. 39.

5. *Lester v. Mississippi Home Ins. Co.*, 19 So. Rep. 99 (Miss.); *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253.

6. *Smith v. Niagara Ins. Co.*, 60 Vt. 682, 15 Atl. Rep. 353; *Etna Ins. Co. v. Resh*, 40 Mich. 241.

By statute in New Hampshire an omission to state facts in regard to title and interest does not void the policy, unless such omission is intentional and fraudulent.

Tuck v. Hartford Ins. Co., 56 N. H. 326. See Vol. 1, *Fire Insurance as Valid Contract*, p. 508.

RULE 14.

When Company Put upon Inquiry as to Interest.

When the company is put upon inquiry by an incomplete, ambiguous, or uncertain answer relating to title in a written application, and issues a policy without further inquiry, it may be assumed that it intended to insure whatever insurable interest the applicant had in the entire premises.

Clawson v. Citizens' Ins. Co., 121 Mich. 591, 80 N. W. Rep. 573.

RULE 15.

No Concealment as to Value.

There is no concealment in withholding facts in regard to value of subject-matter of the insurance in case of an open policy.

Ins. Co. of N. A. v. Osborn, Ind. App. , 59 N. E. Rep. 181.

RULE 16.

Effect of a Diagram as Concealment.

A diagram is not of itself material on an issue of concealment, unless the insured knows or has reason to know that he is required to represent surrounding property for a certain distance;¹ or unless buildings omitted are in immediate vicinity of the property insured and are manifestly an increase of the risk by the exposure.²

1. *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520.

2. *Gilligan v. Commercial Ins. Co.*, 20 Hun, 93, aff'd, 87 N. Y. 626, without opinion. And see *Gates v. Madison Ins. Co.*, 5 N. Y. 469.

CHAPTER SECOND.

Misrepresentation.

- RULE**
1. As imposed by contract.
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 20. Representation as to construction or situation of building — When question of law.
 21. When no misrepresentation as to building or other subject of insurance.
 22. Representation as to other insurance.
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 25. Contract severable.

RULE 1.

As Imposed by Contract.

This entire policy shall be void if the insured has misrepresented, in writing or otherwise, any material

fact or circumstance concerning this insurance or the subject thereof.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire,

provides:

"This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured.

The standard form prescribed in New Hampshire also provides by statute made a part of it: "policy shall not be avoided by reason of any mistake or misrepresentation, unless it appears to have been intentionally and fraudulently made, or unless the difference between the property as it was represented and the property as it really existed contributed to the loss; but the sum insured by the policy shall be taken to be such fractional part of the sum mentioned therein as the premium paid by the insured is of the premium which he ought to have paid, not exceeding in any event the value of the insured interest in the property. If a company shall issue a policy upon an application prepared by a third person assuming to act as its agent or otherwise, it shall be charged with his knowledge of facts relating to the property insured as if they were stated in the application."

The standard form of South Dakota provides: "This policy shall be void if any material fact or circumstance concerning the risk has been, or the amount of loss shall be, fraudulently misrepresented by the insured."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

* See note to "Concealment," Rule 1, page 2.

It would seem that misrepresentation as to a material matter voids the insurance independent of any contract provision.

Armour v. Transatlantic Ins. Co., 90 N. Y. 450, 455; *Clarkson v. Western Assur. Co.*, 33 App. Div. 23, 53 N. Y. Supp. 508; *Evans v. Columbia Ins. Co.*, 40 Misc. 316, 81 N. Y. Supp. 933; *Daniels v. Hudson River Ins. Co.*, 66 Mass. 416; *Clark v. Union Ins. Co.*, 40 N. H. 333; *American Central Ins. Co. v. Antram, Miss.*, 38 So. Rep. 626.

Under the Wisconsin statute if policy is issued without any written application, a defense of misrepresentation is not available.

Johnson v. Scottish Union & National Ins. Co., 93 Wis. 223, 26 Ins. L. J. 59, 67 N. W. Rep. 416.

The Tennessee statute providing that a misrepresentation or warranty is no defense unless made with actual intent to deceive, or the risk is increased, is not unconstitutional.

Continental Ins. Co. v. Whitaker, Tenn., 79 S. W. Rep. 119.

RULE 2.

Representation Distinguished from Warranty.

A mere representation as distinguished from a warranty is a verbal or written statement made by the insured to the underwriter or insurance company, before issue of the policy, as to the existence of some fact, or state of facts, tending to induce the insurance company more readily to assume the risk, by affecting the estimate which might otherwise be formed.

Commonwealth Ins. Co. v. Monninger, 18 Ind. 352; *Pierce v. Empire Ins. Co.*, 62 Barb. 636; *Germania Ins. Co. v. Deckard, Ind.*, 28 N. E. Rep. 868; *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507 (U. S.); *Curel v. Mississippi Ins. Co.*, 9 La. 163.

RULE 3.

Representations Basis of Insurance — Effect of Falsity.

Representations of an applicant become the basis of insurance, and if they be false, touching matters material to the risk, the contract obtained through their influence cannot be enforced; and it is, in such case,

quite immaterial whether the misstatement resulted from bad faith or from accident or ignorance.¹ And this rule applies equally to contracts of reinsurance.²

1. *Seal v. Farmers' Ins. Co.*, 59 Nebr. 253, 80 N. W. Rep. 807; *State Ins. Co. v. DuBois*, 7 Colo. App. 214, 44 Pac. Rep. 756; *Continental Ins. Co. v. Kasey*, 25 Gratt. 268 (Va.); *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 So. Rep. 143; *Menk v. Commercial Ins. Co.*, 70 Cal. 585; *Ring v. Phoenix Ins. Co.*, 145 Mass. 426, 14 N. E. Rep. 525; *Carpenter v. American Ins. Co.*, 1 Story, 57 (U. S. Cir.); *Glade v. Germania Ins. Co.*, 56 Iowa, 400; *Armour v. Transatlantic Ins. Co.*, 90 N. Y. 450, 12 Ins. L. J. 345; *Smith v. Ætna Ins. Co.*, 49 N. Y. 211; *Evans v. Columbia Ins. Co.*, 40 Misc. 316, 81 N. Y. Supp. 933; *Tyree v. Virginia F. & M. Ins. Co.*, W. Va. , 46 S. E. Rep. 706.

2. *Louisiana Ins. Co. v. New Orleans Ins. Co.*, 13 La. Ann. 246.

RULE 4.

Representation Relates to Past or Existing Fact—If Promissory, Should be Inserted in Contract.

A representation to render void a contract of insurance must relate to some past or existing fact; if in the nature of a promise or stipulation for future conduct, it must be inserted in or made part of the contract or policy.

Alston v. Mechanics' Ins. Co., 4 Hill, 329 (N. Y.); *Mayor of New York v. Brooklyn Ins. Co.*, 4 Keyes, 465, 3 Abb. Ct. App. Dec. 251. And see *Aurora Ins. Co. v. Eddy*, 55 Ill. 213; *Schmidt v. Peoria Ins. Co.*, 41 Ill. 295.

RULE 5.

When Insured Bound by Written Application.

Statements in a written application to bind the insured must be either made by him or by some one with authority to act for and represent him in making them.

McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. Rep. 475; *Blass v. Agricultural Ins. Co.*, 18 App. Div. 481, 46 N. Y.

Supp. 392, aff'd, 162 N. Y. 639, without opinion; *Rosecrans v. North American Ins. Co.*, 66 Mo. App. 352; *Phoenix Ins. Co. v. Owens*, 81 Mo. App. 201. And see "Warranty," Rules 18-21.

RULE 6.

Effect of Filling up an Application by Company's Agent — Insured Responsible for His Own Misstatements.

If the company's agent authorized to solicit, take, and fill up a written application, and with knowledge of the facts, as to which he is correctly informed, makes misstatements therein, misrepresentation by the insured cannot be predicated thereon.¹ The insured does not become responsible for such misstatements by merely signing the application.² The fact that the insured is not responsible for such misstatements may be shown by parol evidence,³ and the ground upon which the evidence is admissible is that of equitable estoppel.⁴ The insured is not relieved from the consequences of his own misrepresentations by the mere fact that he had the assistance of the agent in drawing his application.⁵

1. *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. Rep. 1106; *Continental Ins. Co. v. Whitaker*, Tenn. , 79 S. W. Rep. 119; *Shell v. German Ins. Co.*, 60 Mo. App. 644; *Ormsby v. Laclede Ins. Co.*, 105 Mo. App. 143, 79 S. W. Rep. 733; *Bushnell v. Farmers' Ins. Co.*, Mo. App. , 85 S. W. Rep. 103; *Springfield F. & M. Ins. Co. v. Phillips*, 16 Ky. L. Rep. 390; *Manchester Assur. Co. v. Dowell*, 80 S. W. Rep. 207 (Ky.); *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646, 48 N. W. Rep. 296, 20 Ins. L. J. 463; *American Ins. Co. v. Walston*, 111 Ill. App. 133. And see "Warranty."

2. *Yoch v. Home Ins. Co.*, 111 Cal. 503, 44 Pac. Rep. 189.

3. *Millers' National Ins. Co. v. Jackson County Milling Co.*, 60 Ill. App. 224.

4. *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. Rep. 370.

5. *Lowell v. Middlesex Ins. Co.*, 8 Cush. 127 (62 Mass.).

RULE 7.**Misrepresentation not Predicated on Defective Answers in Application.**

Misrepresentation cannot be founded upon a defective or incomplete answer in a written application accepted by the insurance company, when further or more specific inquiry would have called for the facts.

Farmers' Ins. Co. v. Lecroy, 91 Ill. App. 41; *Chicago Ins. Co. v. Bigelow*, 62 Ill. App. 200.

RULE 8.**Misrepresentation May be Evidenced by Written Description Furnished to Fill up Policy.**

A written memorandum or description from which the policy is filled up, in connection with other evidence, may be used for showing a misrepresentation on the part of the assured.

Saunders v. Agricultural Ins. Co., 167 N. Y. 261, 270, N. E. Rep. .

RULE 9.**When Insured not Bound by Verbal Representations.**

When an application by the insured is in writing the insurance company has no right to rely on verbal representations or statements by a messenger sent by the broker to its agent, nor to assume that such statements or representations are made with the knowledge or consent of the insured.

Dolliver v. St. Joseph Ins. Co., 131 Mass. 39.

RULE 10.

Influence of Misrepresentations not Assumed.

If an application is made out in one State and policy issued thereon by an insurance company in another State it will not be assumed, in the absence of evidence upon that point, that the officers of the insurance company at its home office were influenced by misrepresentations contained in such application.

State Ins. Co. v. New Hampshire Trust Co., 47 Nebr. 62, 66 N. W. Rep. 9, 25 Ins. L. J. 307, rehearing denied, 47 Nebr. 71, 66 N. W. Rep. 1106.

RULE 11.

No Misrepresentation When Company Knows Facts.

There is no misrepresentation when the insurance company or its authorized agent knows the facts;¹ but on a specific representation by the insured as to number or quantity, the agent of the insurance company is not bound to verify the same, nor is he chargeable with knowledge, though he may see the property in bulk, and the assured is not relieved of responsibility for his material misrepresentation.²

1. *McKibban v. Des Moines Ins. Co.*, 114 Iowa, 41, 86 N. W. Rep. 38; *Petty v. Mutual Ins. Co.*, 111 Iowa, 358, 82 N. W. Rep. 767; *Fire Assoc. v. Bynum*, 44 S. W. Rep. 579 (Tex. Civ. App.); *Rosencrans v. North American Ins. Co.*, 66 Mo. App. 352; *Franklin Ins. Co. v. Martin*, 40 N. J. L. 568; *Miller v. Hartford Ins. Co.*, 70 Iowa, 704; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600; *Wilson v. Minnesota Ins. Assoc.*, 36 Minn. 112, 30 N. W. Rep. 401; *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 So. Rep. 379; *German Ins. Co. v. Churchill*, 26 Ill. App. 206; *American Central Ins. Co. v. Brown*, 29 Ill. App. 602; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Hough v. City Ins. Co.*, 29 Conn. 10; *Clark v. Union Ins. Co.*, 40 N. H. 333.

2. *Hartford Ins. Co. v. Magee*, 47 Ill. App. 367.

RULE 12.

Expression of Opinion or Belief.

If the insured fairly states or represents an honest opinion or belief, it is not such misrepresentation as will void the policy, where the statement does not amount to a warranty.

Imperial Ins. Co. v. Murray, 73 Pa. St. 13; *Susquehanna Ins. Co. v. Staats*, 102 Pa. St. 529; *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 433, 12 Ins. L. J. 301; *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Mutual Ins. Co. v. Gordon*, 121 Ill. 366, 12 N. E. Rep. 747. And see *Merchants' Ins. Co. v. Vining*, 68 Ga. 197.

RULE 13.

Whether Statement an Opinion or Representation of Fact Question for Jury.

There is a distinction between the expression of an opinion or belief and a positive statement or representation of fact. If there is any question or doubt as to being one or the other, it is properly left to a jury to determine.

Standard Oil Co. v. Amazon Ins. Co., 14 Hun, 619, aff'd, 79 N. Y. 506. And see *Riach v. Niagara District Ins. Co.*, 21 Up. Can. C. P. 464; *Wood v. Firemen's Ins. Co.*, 126 Mass. 316; *National Bank v. Ins. Co.*, 95 U. S. 673.

RULE 14.

Misrepresentation by Insured's Agent.

A material misrepresentation by an agent of insured for obtaining or effecting the insurance will defeat it, though not known to the insured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the insured him-

self;¹ but when the insurance company alleges a fraudulent misrepresentation as to title, knowledge of falsity and intent to deceive the company must be established.²

1. *Armour v. Transatlantic Ins. Co.*, 90 N. Y. 450, 12 Ins. L. J. 345.

2. *Helvetia-Swiss Ins. Co. v. Allis Co.*, 11 Colo. App. 264, 53 Pac. Rep. 242.

RULE 15.

Must be Material—Question of Fact—Burden of Proof—Evidence.

The matter or fact misrepresented must be material.¹ Materiality is a question for the jury² when not apparent or undisputed that the misrepresentation had misled the company or had tendency to do so.³ When not obviously material there is no presumption unfavorably affecting the understanding of the insured.⁴ Materiality is affected not only by specific location, but environment or situation as regards external circumstances.⁵ The burden of proof as to misrepresentation rests upon the insurance company.⁶ A specific inquiry by the company, and answer by the insured is at least evidence of materiality, and may be conclusive if policy in terms so provides.⁷ Materiality cannot be established by opinion evidence.⁸

1. *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. Rep. 434; *Hawley v. Liv., L. & G. Ins. Co.*, 102 Cal. 651, 36 Pac. Rep. 926, 23 Ins. L. J. 874; *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. Rep. 1116, 24 Ins. L. J. 611; *Burge v. Greenwich Ins. Co.*, 106 Mo. App. 244, 80 S. W. Rep. 342; *Bonnett v. Merchants Ins. Co.*, 42 S. W. Rep. 316, Tex. Civ. App. ; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Waterbury v. Dakota F. & M. Ins. Co.*, 6 Dak. 468, 43 N. W. Rep. 697; *Mosley v. Vermont Ins. Co.*, 55 Vt. 142; *Clark v.*

Manufacturers' Ins. Co., 2 Woodb. & M. 472, aff'd, 8 How. 235 (U. S.); *Bankhead v. Des Moines Ins. Co.*, 70 Iowa, 387.

2. *Manufacturers & Merchants' Ins. Co. v. Zeiting*, 168 Ill. 286, 48 N. E. Rep. 179; *Landes v. Safety Ins. Co.*, 190 Pa. St. 536, 42 Atl. Rep. 961; *Davis v. Ætna Ins. Co.*, 67 N. H. 335, 39 Atl. Rep. 902, 27 Ins. L. J. 549; *Brooks v. Erie Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748, aff'd, 177 N. Y. 572, on opinion below; *Garrison v. Farmers' Ins. Co.*, 56 N. J. L. 235, 28 Atl. Rep. 8; *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; *Percival v. Maine Ins. Co.*, 33 Me. 242; *Farmers' Ins. Co. v. Snyder*, 16 Wend. 481 (N. Y.); *Bellaty v. Thomas-ton Ins. Co.*, 61 Me. 414; *Sweat v. Piscataquis Ins. Co.*, 79 Me. 109, 16 Ins. L. J. 608, 896; *Phenix Ins. Co. v. Fulton*, 80 Ga. 224.

3. *Landes v. Safety Ins. Co.*, *supra*; *Fromherz v. Yankton Ins. Co.*, 7 S. D. 187, 63 N. W. Rep. 784, 24 Ins. L. J. 672; *Armour v. Transatlantic Ins. Co.*, 90 N. Y. 450, 12 Ins. L. J. 345.

4. *Chicago Ins. Co. v. Bigelow*, 62 Ill. App. 200.

5. *Fromherz v. Yankton Ins. Co.*, *supra*.

6. *Jones Manufacturing Co. v. Manufacturers' Ins. Co.*, 8 Cush. 82 (62 Mass.); *Gerhauser v. North B. & M. Ins. Co.*, 7 Nev. 174.

7. *Graham v. Firemen's Ins. Co.*, 87 N. Y. 69, 77; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Dewees v. Manhattan Ins. Co.*, 34 N. J. L. 244.

If any doubt as to materiality by agreement it is decided in favor of assured.

Gerhauser v. North B. & M. Ins. Co., 7 Nev. 174.

8. *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452.

If condition provides that if insured causes the property to be described in the policy otherwise than it really is, so that the same will be charged at a lower premium than otherwise, a misdescription as to the size or dimensions of a building insured, claimed to void the insurance, is properly left to the jury to determine whether it affected the rate of premium or not.

Garrison v. Farmers' Ins. Co., 56 N. J. L. 235, 28 Atl. Rep. 8.

Must be "fraudulent or material to be void" under statute.

McCarty v. Imperial Ins. Co., 126 N. C. 820, 36 S. E. Rep. 284.

A misrepresentation may be converted into a warranty by express stipulation or condition in the policy and void the policy without regard to materiality.

Graham v. Firemen's Ins. Co., 87 N. Y. 69, 11 Ins. L. J. 64.

The language of the policy in this case provided "any misrepresentation whatever, either in a written application or otherwise" * * * should render it void. The word *material* was omitted, but has been reinserted in the standard forms. And see also *Armour v. Transatlantic Ins. Co.*, 90 N. Y. 450, 457, 12 Ins. L. J. 345.

RULE 16.

Rate of Premium as Evidence.

The rate of premium is relevant evidence bearing on question of materiality,¹ which is none the less a question for the jury.²

1. *Germania Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. Rep. 868; *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507 (U. S.); *Franklin Ins. Co. v. Brock*, 57 Pa. St. 74; *Kentucky Ins. Co. v. Southard*, 8 B. Mon. 634 (Ky.); *Waterbury v. Dakota Ins. Co.*, 6 Dak. 468, 43 N. W. Rep. 697; *Nicol v. American Ins. Co.*, 3 Woodb. & M. 529 (U. S. Cir.); *Curel v. Mississippi Ins. Co.*, 9 La. 163.

2. *Columbian Ins. Co. v. Lawrence*, *supra*. Some of the old forms of policies in terms made the rate of premium a test. See *Franklin Ins. Co. v. Martin*, 11 Vroom, 568 (N. J.).

RULE 17.

Effect of Company Being Put Upon Inquiry as to Interest or Title.

When the company is put upon inquiry by an incomplete, ambiguous, or uncertain answer relating to title in a written application, and issues a policy without further inquiry, it may be assumed that it intended to insure whatever insurable interest the applicant had in the entire premises.

Clawson v. Citizens' Ins. Co., 121 Mich. 591, 80 N. W. Rep. 573.

RULE 18.

When Representation as to Interest or Title Material.

A substantial misrepresentation as to interest or title is always material as matter of law, when policy in terms requires true statement.

Pelican Ins. Co. *v.* Smith, 92 Ala. 428, 9 So. Rep. 327, subsequent appeal, 107 Ala. 313, 18 So. Rep. 105; Freedman *v.* Fire Assoc., 168 Pa. St. 249, 32 Atl. Rep. 39, 25 Ins. L. J. 74. And see Marshall *v.* Columbian Ins. Co., 7 Fost. 157 (27 N. H.); Jenkins *v.* Quincy Ins. Co., 7 Gray, 370 (73 Mass.); Ehram *v.* Phoenix Ins. Co., 43 Nebr. 554, 61 N. W. Rep. 732, 24 Ins. L. J. 316; Tyree *v.* Virginia F. & M. Ins. Co., W. Va. , 46 S. E. Rep. 706.

RULE 19.

When no Misrepresentation as to Interest or Title.

It is not misrepresentation, in absence of specific inquiry or requirement, for the insured to state that he owns the property, where in fact he has only a life interest or estate or equitable title;¹ that he held the property on contract, when in fact the contract is with himself and wife;² that property is *jointly* owned, when in fact it is severally owned;³ that property belongs to a firm or partnership insured as such, when in fact it belongs to an individual doing business in such firm name;⁴ that insured is owner, when property is subject to an equity of redemption or otherwise interest limited;⁵ that property is not incumbered, when in fact a mortgage had been discharged by an executory agreement not fully performed;⁶ that he owns the property, when in fact it is subject to incumbrance or mortgage;⁷ that he has a homestead, when

in fact the title is not fully perfected;⁸ that his title is "W. D." does not necessarily mean warranty deed, and that it is a fee.⁹

1. *Convis v. Citizens' Mutual Ins. Co.*, 127 Mich. 616, 86 N. W. Rep. 994; *Farmers' Ins. Co. v. Fogelman*, 35 Mich. 481.

2. *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. Rep. 463, 26 Ins. L. J. 910.

3. *Webster v. Dwelling-House Ins. Co.*, 53 Ohio St. 558, 42 N. E. Rep. 546, 25 Ins. L. J. 488.

4. *Bonnet v. Merchants' Ins. Co.*, 42 S. W. Rep. 316, Tex. Civ. App. ; *Merchants' Ins. Co. v. Bonnet*, 48 S. W. Rep. 1110, Tex. Civ. App.

5. *Clapp v. Union Ins. Co.*, 7 Fost. 143 (27 N. H.) ; *Liverpool, L. & G. Ins. Co. v. McGuin*, 52 Miss. 227.

6. *Hawkes v. Dodge County Ins. Co.*, 11 Wis. 188.

7. *Buck v. Phoenix Ins. Co.*, 76 Me. 586, 14 Ins. L. J. 412; *Guest v. New Hampshire Ins. Co.*, 66 Mich. 98, 16 Ins. L. J. 790.

8. *St. Paul F. & M. Ins. Co. v. Neidecken*, 6 Dak. 494, 43 N. W. Rep. 696.

9. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

In Massachusetts, under a statute, misrepresentation as to title by a general statement of ownership when the interest is limited is no defense unless there is intention to deceive.

Doyle v. American Ins. Co., 181 Mass. 139, 63 N. E. Rep. 394.

RULE 20.

**Representation as to Construction or Situation of Building —
When Question of Law.**

A misrepresentation in a written description in application and policy, affecting the construction and situation of building insured, is material to the risk, and the interpretation of such written description, when not ambiguous, should not be left to the jury, but should be determined by the court as matter of law.

Northrup v. Porter, 17 App. Div. 80, 44 N. Y. Supp. 814.

RULE 21.

When no Misrepresentation as to Building or Other Subject of Insurance.

It is not misrepresentation for the insured to state or describe the building as "occupied by the assured," when in fact one room is used by a tenant during the day or business hours;¹ to describe it as a dwelling, when in fact some rooms were used as a laundry or to store furniture not in use,² and the building had been formerly used as a factory;³ description of a house as a dwelling is not a representation that it is occupied;⁴ description as "a corrugated iron-clad" building is not made a misrepresentation by the fact that building was of brick;⁵ it is not misrepresentation to call a building a sawmill, as a single structure, though parts were erected at different times;⁶ that a building is situate on land in a certain quarter section, when in fact a part of the land is in an adjoining section;⁷ that there is a force pump does not by implication include hose;⁸ a description as "woodhouse" is not necessarily made untrue or false by the fact that part is used as a carriage house;⁹ a representation that goods are in a "store" is not true when they are in a tavern or hotel.¹⁰

1. *Liverpool, L. & G. Ins. Co. v. Colgin*, 34 S. W. Rep. 291, Tex. Civ. App.

2. *Mitchell v. Niagara Ins. Co.*, 91 Hun, 287, 36 N. Y. Supp. 204.

3. *Mitchell v. Niagara Ins. Co.*, *supra*.

4. *Slobodisky v. Phoenix Ins. Co.*, 53 Nebr. 816, 74 N. W. Rep. 270.

5. *Johnston v. Farmers' Ins. Co.*, 106 Mich. 96, 64 N. W. Rep. 5.

6. *Garrison v. Farmers' Ins. Co.*, 56 N. J. L. 235, 28 Atl. Rep. 8. And see *White v. Mutual Ins. Co.*, 8 Gray, 566 (Mass.).
7. *Dougherty v. German-American Ins. Co.*, 67 Mo. App. 526.
8. *Peoria Ins. Co. v. Lewis*, 18 Ill. 553.
9. *White v. Mutual Ins. Co.*, 8 Gray, 566 (Mass.).
10. *Prudhomme v. Salamander Ins. Co.*, 27 La. Ann. 695.

RULE 22.

Representation as to Other Insurance.

A representation by the insured that other concurrent and proportionate insurance is in existence upon the same property is material to the risk, and if false to the knowledge of the insured it voids the policy;¹ and where such misrepresentation is made by the insured's agent it voids the policy, though honestly made.²

1. *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. L. 52, 580, 46 Atl. Rep. 777. And see *Armour v. Transatlantic Ins. Co.*, 90 N. Y. 450, 12 Ins. L. J. 345.

2. *Armour v. Transatlantic Ins. Co.*, *supra*.

RULE 23.

Representation of Incumbrance.

A specific statement or representation, when made or required as to the amount of incumbrance, is considered material, and voids the policy if in fact there is substantially more than represented;¹ but the company's subsequent consent to an incumbrance replacing it cures the misrepresentation.²

1. *Smith v. Agricultural Ins. Co.*, 118 N. Y. 518, 23 N. E. Rep. 883, 19 Ins. L. J. 374; *Glade v. Germania Ins. Co.*, 56 Iowa, 400; *Bowditch Ins. Co. v. Winslow*, 8 Gray, 38 (Mass.); *Hayward v. New England Ins. Co.*, 10 Cush. 444 (Mass.); *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 9 Ins. L. J. 743; *Ryan v. Springfield Ins. Co.*, 46 Wis. 671.

2. *Lebanon Ins. Co. v. Losch*, 109 Pa. St. 100, 15 Ins. L. J. 104.

RULE 24.

Representation as to Value.

Ordinarily a statement of valuation in an application is a mere matter of opinion.¹ A representation as to value must be shown to be so widely at variance with the truth that a misleading or fraudulent intention may be presumed or found from the facts.² The burden of proof rests upon the insurance company.³ There may be a distinction made in the policy between open and valued policies.⁴ Materiality is affected by knowledge of company's agent.⁵ When policy in terms provides that an overvaluation shall void it, then a substantial overvaluation is made material by agreement of the parties.⁶ The insured may be responsible for a material overvaluation by his agent without regard to intent or fraud.⁷

1. *Hayes v. Saratoga Ins. Co.*, 81 App. Div. 287, 80 N. Y. Supp. 888; *Baker v. State Ins. Co.*, 31 Oreg. 41, 48 Pac. Rep. 699.

2. *Baker v. State Ins. Co.*, *supra*; *Bowlus v. Phoenix Ins. Co.*, 133 Ind. 106, 32 N. E. Rep. 319; *Liverpool, L. & G. Ins. Co. v. Stern*, 29 S. W. Rep. 678 (Tex. Civ. App.); *Phoenix Ins. Co. v. McKernan*, 104 Ky. 224, 46 S. W. Rep. 10, 27 Ins. L. J. 870; *Insurance Co. N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. Rep. 471; *Hartford Ins. Co. v. Magee*, 47 Ill. App. 367; *Catron v. Tennessee Ins. Co.*, 6 Humph. 176 (Tenn.); *Wilbur v. Bowditch Ins. Co.*, 10 Cush. 446 (Mass.); *Protection Ins. Co. v. Hall*, 15 B. Mon. 411 (Ky.); *Lynchburg Ins. Co. v. West*, 76 Va. 575, 12 Ins. L. J. 51; *Citizens' Ins. Co. v. Short*, 62 Ind. 316; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Parsons v. Citizens' Ins. Co.*, 43 Up. Can. Q. B. 261; *Lycoming Ins. Co. v. Rubin*, 79 Ill. 402; *Miller v. Alliance Ins. Co.*, 7 Fed. Rep. 649; *Dunham v. Citizens' Ins. Co.*, 34 Wash. 205, 75 Pac. Rep. 804.

3. *Insurance Co. N. A. v. Coombs*, *supra*.

4. *Lee v. Howard Ins. Co.*, 11 Cush. 324 (Mass.); *Aurora Ins. Co. v. Johnson*, 46 Ind. 315.

5. *Insurance Co. N. A. v. McDowell*, 50 Ill. 120; *German Ins. Co. v. Miller*, 39 Ill. App. 633; *Gerhauser v. North B. &*

M. Ins. Co., 7 Nev. 174; Myers v. Council Bluffs Ins. Co., 72 Iowa, 176; Dupree v. Virginia Home Ins. Co., 93 N. C. 237, 11 Ins. L. J. 390; Perry v. Mechanics' Ins. Co., 11 Fed. Rep. 485.

6. Boutelle v. Westchester Ins. Co., 51 Vt. 4. And see Briggs v. Firemen's Fund Ins. Co., *supra*; and see "Materiality."

7. Home Ins. Co. v. Eakin, 2 Tex. Ct. App. Civ. Cas. 665, 14 Ins. L. J. 569. And see Armour v. Transatlantic Ins. Co., 90 N. Y. 450, 12 Ins. L. J. 345.

Under the Georgia statute a misrepresentation by the assured, whether fraudulent or not as to value, but which does not in any manner affect the risk, will not void a policy of insurance except in case of valued policies.

Rosser v. Georgia Home Ins. Co., 101 Ga. 716, 29 S. E. Rep. 286.

Under an old Maine statute (1861) it was held that an overvaluation must have contributed to the loss, or materially increased the risk. The statute is probably superseded or repealed by that prescribing the standard form. And see repealing act R. S., 1903.

Thayer v. Providence Ins. Co., 70 Me. 531.

RULE 25.

Contract Severable.

When insurance is itemized in the policy, covering several subjects in separate specific amounts, a misrepresentation as to one of the subjects does not affect validity of the insurance as to the other.

Schuster v. Dutchess County Ins. Co., 102 N. Y. 260, 15 Ins. L. J. 463; Koontz v. Hannibal Ins. Co., 42 Mo. 126.

See also Vol. 1, Fire Insurance as Valid Contract, "Construction," Rule 26, and note.

CHAPTER THIRD.

Warranty.

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RULE 1.

As Imposed by Contract.

If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island,
New Jersey,	Wisconsin.

By the standard form in Michigan:

“If an application, survey, plan or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured as to material facts.”

The standard form of policy prescribed in

Maine,	Minnesota,
Massachusetts,	New Hampshire,

does not contain any such provision.

The standard form of policy prescribed in New Hampshire provides by statute made a part of it:

“Descriptions of property and statements concerning its value and the title of the insured thereto in an application for insurance or in an insurance policy shall not be treated as warranties.”

* See note to Concealment, Rule 1, page 2.

In South Dakota the form provides:

"Neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract of insurance."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

The absence or presence of these specific contract provisions in the usual printed or standard forms does not affect the right of the parties to create an effective warranty either by use of that word in the special written or printed matter inserted or attached, or by proper and sufficient language relating to the risk evidencing such intention.

See Rules 2 *et seq.*

Under the Ohio Revised Statutes the fact that property was occupied differently than as stated in the policy, the agent of the company knowing the facts, does not void the insurance unless there is intentional fraud on part of the assured.

United Farmers' Ins. Co. *v.* Kukral, 7 Ohio C. C. 356.

The Tennessee statute, providing that a misrepresentation or warranty is no defense unless made with actual intent to deceive, or the risk is increased, is not unconstitutional.

Continental Ins. Co. *v.* Whitaker, Tenn. , 79 S. W. Rep. 119.

The Missouri statute (R. S. 1899, § 7973) does not avoid all warranties, but only such as are not material to the risk. All matters which are material to the risk are left just as they were before the statute.

Kennefick-Hammond Co. *v.* Norwich Union Fire Assoc., Mo. App. , 80 S. W. Rep. 694. And see Dolan *v.* Missouri Town Ins. Co., 88 Mo. App. 666.

RULE 2.

What Construed as a Warranty.

Creation of a warranty does not depend upon the use of that word;¹ no technical words or form of expression are necessary to constitute a warranty. Words of affirmation or statements imputing conditions or undertaking on the part of the assured, relating to the risk or affecting its character or extent,

upon which it must be inferred the insurance company contracted, will ordinarily be construed and held to be a warranty.²

1. *Redman v. Hartford Ins. Co.*, 47 Wis. 89; *Wood v. Hartford Ins. Co.*, 13 Conn. 544. And see *Barnard v. Faber*, L. R. 1 Q. B. 340 (1893). (In this case a Lloyds policy was "warranted to be on same rate, terms, and identical interest as the _____ Insurance Company," and it was held that the words created a condition precedent, irrespective of use of the word "warranty," and it appearing that the premium and the interest differed in the other policy, the insurance was thereby voided.)

2. *Texas Ins. Co. v. Stone*, 49 Tex. 4; *Wood v. Hartford Ins. Co.*, *supra*; *Wall v. East River Ins. Co.*, 7 N. Y. 373.

In *Wood v. Hartford Ins. Co.*, *supra*, the court says: "The general rule in regard to what constitutes a warranty, in a contract of insurance is well settled. Any statement or description, or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. Whether this is declared to be a warranty *totidem verbis*, or is ascertained to be such by construction, is immaterial. In either case, it is an express warranty, and a condition precedent. If a house be insured against fire, and is described in the policy as being 'copper roofed,' it is as express a warranty, as if the language had been 'warranted to be copper roofed;' and its truth is as essential to the obligation of the policy, in the one case as in the other. In either case it must be strictly observed. There may often be much difficulty in ascertaining from the construction of the policy whether a fact, quality or circumstance specified, relates to the risk, or is inserted for some other purpose — as to show the identity of the article insured, etc. This must be settled before the rule can be applied. But when it is once ascertained, that it relates to the risk, and was inserted in reference to that, it must be strictly observed and kept, or the insurance is void. The word 'warranty' dispels all ambiguity, and supersedes the necessity of construction. Parties may contract as they please. When a condition precedent is adopted, the court cannot inquire as to its wisdom or folly, but must exact its strict observance. An entry on the margin of the policy, or across the lines, or on a separate paper, expressly referred to in the policy, will be construed a warranty, if it relates to the risk; that is, if it defines, or in any respect, limits, the risk assumed. It may indeed, where the explicit

language of a warranty is not adopted, be difficult to ascertain, whether on a fair construction, the clause was meant to define or limit a risk; but when this is ascertained, the insured has no right to dispense with it, or substitute in its place another risk, however advantageous to the insurer. It is immaterial whether the nonperformance or violation of the warranty, be with or without, the consent or fault of the insured. Its strict observance is exacted by law, and no reason or necessity will dispense with it." Cited and approved in *Wall v. East River Ins. Co.*, 7 N. Y. 373. And see *Fowler v. Ætna Ins. Co.*, 6 Cow. 673, 7 Wend. 270.

RULE 3.

Express Warranty and Effect — Distinction Between Warranty and Representation — Not Affected by Good or Bad Faith.

An express warranty is a stipulation inserted in writing on the face of the policy, or made part of it, on the literal truth or fulfillment of which the validity of the entire contract depends.¹ A representation precedes, and is no part of, the contract of insurance.² In case of warranty it is immaterial whether the statements were made in ignorance or fraudulently,³ in good faith or bad faith, or according to belief of insured.⁴

1. *Petit v. German Ins. Co.*, 98 Fed. Rep. 800; *Pierce v. Empire Ins. Co.*, 62 Barb. 636; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367; *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622; *Wood v. Hartford Ins. Co.*, 13 Conn. 544; *Burge v. Greenwich Ins. Co.*, Mo. App. , 80 S. W. Rep. 342.

2. *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Pierce v. Empire Ins. Co.*, *supra*; *Williams v. New England Ins. Co.*, 31 Me. 219.

3. *Baker v. Home Ins. Co.*, 64 N. Y. 648; *Merwin v. Star Ins. Co.*, 7 Hun, 659, *aff'd*, 72 N. Y. 603, without opinion; *Gould v. York County Ins. Co.*, 47 Me. 403; *Phenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 So. Rep. 143; *Menk v. Commercial Ins. Co.*, 70 Cal. 585.

4. *Commonwealth Ins. Co. v. Huntzinger*, 98 Pa. St. 41; *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Wood v. Hartford Ins. Co.*, 13 Conn. 544.

RULE 4.**Test of Warranty by Construction.**

A warranty in an insurance contract is a statement made therein by the assured, which is susceptible of no construction other than that the parties mutually intended that the policy should not be binding unless such statement be literally true.

Phoenix Assur. Co. v. Munger Cotton Mfg. Co., 92 Tex. 297, 49 S. W. Rep. 222, 28 Ins. L. J. 248; *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. Rep. 587, 20 Ins. L. J. 506. And see *Aurora Ins. Co. v. Eddy*, 49 Ill. 106, 55 Ill. 213.

RULE 5.**As Affected by Construction — Ambiguity.**

The written part, description, or matter inserted in or made part of the policy does not necessarily amount to a warranty. The courts are not inclined to search for and create or establish a warranty, breach, and forfeiture, in or by construction. If a specific thing is warranted in terms, or there is exact language relating to the risk clearly showing intention, then in legal effect a warranty results. When it depends upon uncertain language, or words having a double meaning, or there is any ambiguity, requiring construction, it favors the insured. If the insurance company does not see fit to protect itself by proper and exact or certain language as a warranty when it issues the policy, it cannot reasonably or legally expect the courts to extend the protection after a fire by construction of ambiguous, doubtful, or uncertain words.

United States F. & M. Ins. Co. v. Kimberly, 34 Md. 224; *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. Rep.

1116, 24 Ins. L. J. 611; *Cox v. Ætna Ins. Co.*, 29 Ind. 586; *McGannon v. Michigan Millers' Ins. Co.*, Mich. , 87 N. W. Rep. 61; *Parker v. Otsego County Ins. Co.*, 47 App. Div. 204, 62 N. Y. Supp. 190, aff'd, 168 N. Y. 655, without opinion; *Cummer v. Associated Manufacturers' Ins. Co.*, 67 App. Div. 151, 73 N. Y. Supp. 668, aff'd, 173 N. Y. 633, without opinion; *Burleigh v. Gebhard Ins. Co.*, 90 N. Y. 220, 12 Ins. L. J. 141; *Fire Association v. Colgin*, 33 S. W. Rep. 1004, Tex. Civ. App. . And see *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. Rep. 867; *Ætna Ins. Co. v. Simmons*, 49 Nebr. 811, 69 N. W. Rep. 125; *Jackson v. British America Ins. Co.*, 106 Mich. 47, 63 N. W. Rep. 899; *Hart v. Niagara Ins. Co.*, 9 Wash. 620, 38 Pac. Rep. 213; *Wilson v. Conway Ins. Co.*, 4 R. I. 141, 159; *Merchants' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Stebbins v. Globe Ins. Co.*, 2 Hall, 632 (N. Y.); *Newman v. Springfield Ins. Co.*, 17 Minn. 123; *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176, 33 N. W. Rep. 453; *Gates v. Madison Ins. Co.*, 2 N. Y. 43; *McBride v. Republic Ins. Co.*, 30 Wis. 562; *Williams v. New England Ins. Co.*, 31 Me. 219; *Howard Ins. Co. v. Bruner*, 23 Pa. St. 50; *Allen v. Charlestown Ins. Co.*, 5 Gray, 384 (Mass.); *Fuller v. New York Ins. Co.*, 184 Mass. 12, 67 N. E. Rep. 879; *Hosford v. Hartford Ins. Co.*, 127 U. S. 404; *Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673, 39 N. W. Rep. 86; *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238.

And see Vol. 1, *Fire Insurance as Valid Contract*, "Construction."

RULE 6.

When Construction of Warranty Affected by Usage or Custom — Question of Fact.

The construction of a warranty cannot be affected by usage or custom, unless there is proof that the custom was uniform and well settled, and either known to the parties when the contract was made or so generally known or established as to raise a presumption that they had it in mind at the time;¹ when qualified by such usage it becomes a question of fact.²

1. *Gough v. Jewett*, 32 App. Div. 79, 52 N. Y. Supp. 707. And see *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; *Hill v. Hibernia*

Ins. Co., 10 Hun, 26; *Sims v. State Ins. Co.*, 47 Mo. 54; *Texas Banking Co. v. Hutchins*, 53 Tex. 61.

2. *Sims v. State Ins. Co.*, *supra*; *Texas Banking Co. v. Hutchins*, *supra*.

See also Vol. 1, Fire Insurance as Valid Contract, "Construction," Rules 23 and 24.

RULE 7.

When Insured Entitled to Return of Premium.

If policy never takes effect or is void when issued, on account of breach of warranty, in the absence of fraud by the insured, he is entitled to be repaid the premium paid on obtaining the policy.

Jones v. Insurance Co. N. A., 90 Tenn. 604, 18 S. W. Rep. 260, 21 Ins. L. J. 377. And see *Waller v. Northwestern Assur. Co.*, 64 Iowa, 101, 13 Ins. L. J. 789; *Clark v. Manufacturers' Ins. Co.*, 2 Woodb. & M. 472 (U. S. Cir.); *Friesmuth v. Agawam Ins. Co.*, 10 Cush. 587 (Mass.).

RULE 8.

Effect of New Agreement to Pay a Loss.

A breach of warranty is no defense to an action brought upon a new agreement to pay the amount of the loss, in consideration of the surrender and cancellation of the policy, where there is no fraud, and such is the rule even if the insurance company had no knowledge of the breach at the time of the settlement or agreement.

Smith v. Glens Falls Ins. Co., 62 N. Y. 85; *Stache v. St. Paul Ins. Co.*, 49 Wis. 89. And see *Illinois Ins. Co. v. Archdeacon*, 82 Ill. 236.

RULE 9.**Burden of Proof.**

The burden rests upon the insurance company to allege and establish a breach of warranty.

Liverpool, L. & G. Ins. Co. v. Farnsworth Lumber Co., 72 Miss. 555, 17 So. Rep. 445, 24 Ins. L. J. 876; *Weed v. Schenectady Ins. Co.*, 7 Lans. 452 (N. Y.); *Redman v. Ætna Ins. Co.*, 49 Wis. 431; *Bittenger v. Providence-Washington Ins. Co.*, 24 Fed. Rep. 549, 14 Ins. L. J. 893; *Pangborn v. Continental Ins. Co.*, 62 Mich. 638. And see *Fuller v. New York Ins. Co.*, 184 Mass. 12, 67 N. E. Rep. 879.

RULE 10.**Burden of Proof — Sprinkler System.**

An agreement that a sprinkler system is in complete working order, and that the insured will use due diligence to maintain it, will not be construed as a warranty, when that word is not used, so as to put the burden of proof upon the insured; the burden rests upon the insurance company to show that the insured failed to use due diligence.

Fuller v. New York Ins. Co., 184 Mass. 12, 67 N. E. Rep. 879.

RULE 11.**Contract Severable.**

A breach of warranty as to part of the property, if separately insured, does not render the entire policy void.

Smith v. Home Ins. Co., 47 Hun, 30; *Dowley v. Glens Falls Ins. Co.*, App. Div. , 91 N. Y. Supp. 302; *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570, 23 N. E. Rep. 498, 19 Ins. L. J. 492; *Crook v. Phoenix Ins. Co.*, 38 Mo. App. 582. Compare

Cuthbertson v. North Carolina Ins. Co., 96 N. C. 480, 16 Ins. L. J. 465.

And see Vol. 1, Fire Insurance as Valid Contract, "Construction."

RULE 12.

Rule 1. Applies to Paper Independent of Policy.

The words in a policy, "if an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured," apply to some paper independent of the policy, and cannot operate to make a description in the policy itself a warranty.

King Brick Mfg. Co. v. Phoenix Ins. Co., 164 Mass. 291, 25 Ins. L. J. 36, 41 N. E. Rep. 277.

It was held in *Farmers' Ins. Co. v. Curry*, 13 Bush, 312, 6 Ins. L. J. 733 (Ky.), that a statute which provided that all statements or descriptions in an application "shall be deemed and held representations and not warranties" does not prevent parties from contracting otherwise. But mere reference to application as part of policy does not make statements in application warranties.

Kentucky Ins. Co. v. Southard, 8 B. Mon. 634 (Ky.).

RULE 13.

Application Made Part of Contract — Both Must be Proved.

When application is made part of the contract, both constitute the contract, and both must be proved; if in possession of the company, notice to produce it must be served.

America Underwriters' Assoc. v. George, 97 Pa. St. 238, 11 Ins. L. J. 841; *Lycoming Ins. Co. v. Storrs*, 97 Pa. St. 354, 11 Ins. L. J. 519; *Rogers v. Cedar Rapids Ins. Co.*, 72 Iowa, 448.

RULE 14.

Conflict Between Written Application Made Part of Policy and Printed Condition.

A written application made part of the policy, and showing by statements of the insured facts which might otherwise be claimed to render the policy void under a printed condition, operates as a waiver of such condition.

Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238.

RULE 15.

When Statements in Application are Warranties — Construction.

Statements or answers to specific questions in a written application referred to and in terms made a part of the policy are warranties, and, if untrue, prevent recovery and void the insurance,¹ without regard to whether such statements were made in good faith or otherwise.² If the words of reference to an application show an intent for purpose of description or identification only, the application does not become part of the contract.³ The courts will not extend the effect or operation of statements of the insured by construction,⁴ and if language is ambiguous will construe statements as representations merely.⁵

1. *King v. Tioga Fire Assoc.*, 35 App. Div. 58, 54 N. Y. Supp. 1057; *Niles v. Farmers' Ins. Co.*, 119 Mich. 252, 77 N. W. Rep. 933; *Pelican Ins. Co. v. Smith*, 92 Ala. 428, 9 So. Rep. 327, subsequent appeal, 107 Ala. 313, 18 So. Rep. 105; *Fire Assoc. v. American Cement Co.*, Tex. Civ. App. , 84 S. W. Rep. 1115; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Le Roy v. Market Ins. Co.*, 45 N. Y. 80; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; *Burritt v. Saratoga Ins. Co.*, 5 Hill, 188 (N. Y.); *Pierce v. Empire Ins. Co.*, 62 Barb. 636; *Jen-*

nings *v. Chenango Ins. Co.*, 2 Den. 75; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Steward v. Phoenix Ins. Co.*, 5 Hun, 261; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Sheldon v. Hartford Ins. Co.*, 22 Conn. 235; *Philbrook v. New England Ins. Co.*, 37 Me. 137; *Roberts v. Ætna Ins. Co.*, 58 Cal. 83; *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420, 2 Ins. L. J. 569; *Chrisman v. State Ins. Co.*, 16 Oreg. 283, 18 Pac. Rep. 466; *Edwards v. Farmers' Ins. Co.*, 74 Ill. 84; *Citizens' Ins. Co. v. Hoffman*, 128 Ind. 370, 27 N. E. Rep. 745; *Ætna Ins. Co. v. Grube*, 6 Minn. 82; *Roberts v. State Ins. Co.*, 26 Mo. App. 92. And see *Gahagan v. Union Ins. Co.*, 43 N. H. 176; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606, 9 Ins. L. J. 743.

2. *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. Rep. 595, 28 Ins. L. J. 402.

3. *Trench v. Chenango County Ins. Co.*, 7 Hill, 122 (N. Y.); *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452. And see *Sanders v. Cooper*, 115 N. Y. 279; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Albion Lead Works v. Williamsburg City Ins. Co.*, 2 Fed. Rep. 479, 9 Ins. L. J. 435.

4. *Wilkins v. Insurance Co.*, 30 Ohio St. 318; *Dilleber v. Home Ins. Co.*, 69 N. Y. 256; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Mutual Ins. Co. v. Gordon*, 121 Ill. 366, 12 N. E. Rep. 747; *Schroeder v. Traders' Ins. Co.*, 109 Ill. 157, 13 Ins. L. J. 492; *Gates v. Madison County Ins. Co.*, 2 N. Y. 43, 5 N. Y. 469; *Phoenix Ins. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. Rep. 810.

5. *Wilson v. Conway Ins. Co.*, 4 R. I. 141. And see Rule 5; *Boardman v. New Hampshire Ins. Co.*, 20 N. H. 551; *Buell v. Connecticut Ins. Co.*, 2 Flippin, 9, 5 Ins. L. J. 274 (U. S. Cir.).

RULE 16.

Incomplete or Uncertain Statements.

An incomplete or uncertain statement in a written application, or an unanswered question, although made part of the policy, does not amount to a warranty; it must clearly appear that the insured made specific statement therein;¹ if an answer is not responsive to a question, the application should be returned to the insured if the company desires the information.² And

so, if the company wishes more exact information, other questions should be put accordingly.³

1. *Parker v. Otsego County Ins. Co.*, 47 App. Div. 204, 62 N. Y. Supp. 199, aff'd, 168 N. Y. 655, without opinion; *Meyers v. Lebanon Ins. Co.*, 156 Pa. St. 420, 27 Atl. Rep. 39, 23 Ins. L. J. 308; *Dohn v. Farmers' Ins. Co.*, 5 Lans. 275 (N. Y.); *Hosford v. Hartford Ins. Co.*, 127 U. S. 404; *Carson v. Jersey City Ins. Co.*, 14 Vroom, 300 (N. J.). And see *Gates v. Madison Ins. Co.*, 2 N. Y. 43, 5 N. Y. 469; *Masters v. Madison Ins. Co.*, 11 Barb. 624; *Hall v. People's Ins. Co.*, 6 Gray, 185 (Mass.); *Dodge County Ins. Co. v. Rogers*, 12 Wis. 337; *Tiefenthal v. Citizens' Ins. Co.*, 53 Mich. 306; *Liberty Hall Assoc. v. Housatonic Ins. Co.*, 7 Gray, 261 (Mass.); *Nichols v. Fayette Ins. Co.*, 1 Allen, 63 (Mass.); *Bardwell v. Conway Ins. Co.*, 122 Mass. 90; *Peoria Ins. Co. v. Perkins*, 16 Mich. 380; *Dayton v. Kelley*, 24 Ohio St. 345; *Sinclair v. Canadian Ins. Co.*, 40 Up. Can. Q. B. 206; *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520; *Jersey City Ins. Co. v. Carson*, 44 N. J. L. 210; *Lorillard Ins. Co. v. McCulloch*, 21 Ohio St. 176; *Mulville v. Adams*, 19 Fed. Rep. 887, 13 Ins. L. J. 435; *Smith v. Home Ins. Co.*, 47 Hun, 30; *Phoenix Ins. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. Rep. 810.

2. *Meyers v. Lebanon Ins. Co.*, *supra*.

3. *Hall v. People's Ins. Co.*, *supra*; *Wyman v. People's Ins. Co.*, 1 Allen, 301 (Mass.).

RULE 17.

Construction of Questions in Written Application.

The questions in a form of written application should call for specific exact statement, and will not be extended by construction if uncertain in meaning, as, for instance, a question as to whether the insured had ever been refused insurance on mill property, has no reference to companies which do not in any case write insurance on mills; hence the insured's answer "no" may be construed as correct, though he has been refused insurance by such company.

Phoenix Ins. Co. v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. Rep. 810. And see *Stott v. London & L. Ins. Co.*, 21 Ont. 312. And see Rule 5.

RULE 18.

When Insured Bound by Application.

The insured is not bound by an application or statements which he did not make, sign, or authorize to be made,¹ unless the reference to the application is merely for the purpose of identification in ascertaining the subject to which the policy applies;² and an application made out and delivered by the insured upon the request of the company, subsequent to the issue and delivery of the policy, does not amount to a warranty, unless there is new consideration,³ or the policy is made conditional upon the procuring of the survey or application, and its delivery expressly qualified.⁴ This rule does not prevent reference to a survey filed with another company.⁵

1. *Thomas v. Lebanon Ins. Co.*, 78 Mo. App. 268; *Cleavenger v. Franklin Ins. Co.*, 47 W. Va. 595, 35 S. E. Rep. 998; *Denny v. Conway Ins. Co.*, 13 Gray, 492 (Mass.); *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Vilas v. New York Central Ins. Co.*, 72 N. Y. 590; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495, 13 Ins. L. J. 45; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Hingston v. Aetna Ins. Co.*, 42 Iowa, 46; *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Eilenburger v. Protective Ins. Co.*, 89 Pa. St. 464; *Burson v. Philadelphia Assoc.*, 136 Pa. St. 267, 20 Atl. Rep. 401; *Sprott v. New Orleans Ins. Co.*, 53 Ark. 215, 13 S. W. Rep. 799. And see *Richards v. Washington Ins. Co.*, 60 Mich. 420, 27 N. W. Rep. 586; *Germania Ins. Co. v. Hick*, 23 Ill. App. 381, aff'd, 125 Ill. 361; *South Bend Toy Co. v. Dakota Ins. Co.*, 48 N. W. Rep. 310, 52 N. W. Rep. 866, 20 Ins. L. J. 871 (S. D.); *State Ins. Co. v. New Hampshire Trust Co.*, 47 Nebr. 62, 66 N. W. Rep. 9, 25 Ins. L. J. 307, rehearing denied, 47 Nebr. 71, 66 N. W. Rep. 1106.

2. *Sanders v. Cooper*, 115 N. Y. 279; *Clinton v. Hope Ins. Co.*, *supra*.

3. *Fire Assoc. v. Bynum*, 44 S. W. Rep. 579 (Tex. Civ. App.); *Liverpool, L. & G. Ins. Co. v. Stern*, 29 S. W. Rep. 678

(Tex. Civ. App.) ; *Michigan Ins. Co. v. Wich*, 8 Colo. App. 409, 46 Pac. Rep. 687 ; *Le Roy v. Park Ins. Co.*, 39 N. Y. 56 ; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. Rep. 872, 20 Ins. L. J. 844.

4. *Le Roy v. Park Ins. Co.*, 39 N. Y. 56.

5. *Le Roy v. Market Ins. Co.*, 45 N. Y. 80.

Under special language in the policy insured may be deemed to ratify an application by acceptance of the policy.

Richardson v. Maine Ins. Co., 46 Me. 394. And see *Draper v. Charter Oak Ins. Co.*, 2 Allen, 569 (Mass.).

RULE 19.

Written Application and Policy Must be Construed Together — Application May Limit or Qualify the Warranty.

A written application made part of the policy by its terms may limit, modify, or qualify the warranty or stipulate under what circumstances the policy shall be void.¹ Both the written application and the policy must be construed together, and if there is any doubt as to whether the statement in the application was intended as a warranty it will be construed as a representation only.² And if the application states that the statements therein are true, so far as "known" to the applicant or "material to the risk," the effect is qualified or limited accordingly, and knowledge or materiality must appear;³ if policy issues upon a prior application or one made to another company, insured is responsible for truth of its statements only at time of such prior application.⁴

1. *Cagle v. Chilicothe Ins. Co.*, 78 Mo. App. 215 ; *Lindsey v. Union Ins. Co.*, 3 R. I. 157 ; *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 549 ; *Noone v. Transatlantic Ins. Co.*, 88 Cal. 152, 26 Pac. Rep. 103, 20 Ins. L. J. 776 ; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52 ; *Haley v. Dorchester Ins. Co.*, 12 Gray, 545 (Mass.) ; *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238.

2. *Ætna Ins. Co. v. Simmons*, 49 Nebr. 811, 69 N. W. Rep. 125; *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570, 23 N. E. 498, 19 Ins. L. J. 492. And see *Chrisman v. State Ins. Co.*, 16 Oreg. 283, 18 Pac. Rep. 466; *Byers v. Insurance Co.*, 35 Ohio St. 606; *Edwards v. Farmers' Ins. Co.*, 74 Ill. 84; *Howard Ins. Co. v. Cornick*, 24 Ill. 455. See Rule 5.

3. *Ætna Ins. Co. v. Grube*, 6 Minn. 82; *Garcelon v. Hampden Ins. Co.*, 50 Me. 580; *Houghton v. Manufacturers' Ins. Co.*, 8 Metc. 114 (Mass.); *Lee v. Howard Ins. Co.*, 11 Cush. 324 (Mass.); *Hall v. People's Ins. Co.*, 6 Gray, 185 (Mass.); *Elliot v. Hamilton Ins. Co.*, 13 Gray, 139; *Prieger v. Exchange Ins. Co.*, 6 Wis. 89; *First National Bank v. Hartford Ins. Co.*, 5 Otto, 673, 7 Ins. L. J. 208; *Redman v. Hartford Ins. Co.*, 47 Wis. 89; *Mulville v. Adams*, 19 Fed. Rep. 887, 13 Ins. L. J. 435; *Miller v. Alliance Ins. Co.*, 19 Blatchf. 308 (U. S. Cir.); *Wilkins v. Germania Ins. Co.*, 57 Iowa, 529, 11 Ins. L. J. 790; *Lynchburg Ins. Co. v. West*, 76 Va. 575, 12 Ins. L. J. 51; *Waterbury v. Dakota Ins. Co.*, 6 Dak. 468, 43 N. W. Rep. 697; *Kerr v. Hastings Ins. Co.*, 41 Up. Can. Q. B. 317.

4. *Schroeder v. Trade Ins. Co.*, 109 Ill. 157, 13 Ins. L. J. 492. And see *Boardman v. New Hampshire Ins. Co.*, 20 N. H. 551.

RULE 20.

Effect of Fraud — Insured Responsible for His Own Misstatements in a Written Application — Whether Bound or Not Question of Fact — Presumption.

If the agent of the company is guilty of a fraud upon his principal, and the insured knowingly aids in its perpetration, or by neglecting to read the application suffers it to be perpetrated, he is guilty of participating in the fraud, and must accept and suffer the consequences.¹ The insured is not relieved from the consequence of *his* false statement or a breach, by the mere fact that he signed the application at suggestion of the soliciting agent, and did not know what it contained.² Whether insured is bound or not by a written application may be a question of fact proper to be determined by a jury.³ Insured's signature to

an application creates a presumption that he knew its contents.⁴

1. *Hamburg-Bremen Ins. Co. v. Lewis*, 4 App. Cas. D. C. 66; *Norwich Union Ins. Co. v. Le Bell*, 29 Can. S. C. 470; *Smith v. Ins. Co.*, 24 Pa. St. 320; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Johnson v. Dakota Ins. Co.*, 1 N. D. 167, 45 N. W. Rep. 799.

2. *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. Rep. 587; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411 (Ky.); *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Susquehanna Ins. Co. v. Swank*, 102 Pa. St. 17; *Pottsville Ins. Co. v. Fromm*, 100 Pa. St. 347, 12 Ins. L. J. 21. And see *Pierce v. Empire Ins. Co.*, 62 Barb. 636; *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. 479; *Southern Ins. Co. v. Yates*, 28 Gratt. 585 (Va.); *Cuthbertson v. North Carolina Ins. Co.*, 96 N. C. 480; *Kniseley v. British America Assur. Co.*, 32 Ont. 376.

3. *Cronin v. Fire Assoc.*, 123 Mich. 277, 82 N. W. Rep. 45. And see prior appeal, 112 Mich. 106, 70 N. W. Rep. 448.

4. *Hartford Ins. Co. v. Gray*, 80 Ill. 28, 8 Ins. L. J. 611.

RULE 21.

Agent of Company in Taking and Filling up Written Application — Responsibility for Misstatements — Evidence — Question for Jury.

An agent of the insurance company, with authority to solicit insurance, receive the premium, and deliver policies, in taking and filling a written application, is the representative of the company. The insured has the right to rely upon the knowledge and skill of the agent to properly prepare the application, and to rely upon the authority which the agent assumes. He has the right to consider that, when the agent is told the facts, it is within the apparent scope of his authority to decide upon and frame the answers to the questions in the application; and when, with full knowledge of the facts, the agent assures the applicant that a por-

tion of them are immaterial and himself erroneously misstates others, without the slightest suggestion of fraud or fault on the part of the insured, the company who accredits him must suffer from his mistakes and not the innocent policyholder. Breach of warranty cannot be found in misstatements in the application made part of the policy under such circumstances.¹ Parol evidence is admissible to show the facts upon theory of an estoppel,² and the application of the rule is not affected by limitations upon agent's authority in policy,³ unless the policy in express terms provides or contains an express agreement that the agent shall be deemed the agent of the insured and not of the insurance company under any circumstances whatever;⁴ the insurance company has the right to show that its agent correctly recorded or stated the facts as given to him, and if there is conflict in the testimony it is a question for the jury.⁵ Possession of blank applications may be evidence of agency.⁶ And the mere fact that assured knows that the application has to be forwarded for approval is no evidence of notice of limitation upon the authority of such agent.⁷

1. *Rissler v. American Central Ins. Co.*, 150 Mo. 366, 51 S. W. Rep. 755, 28 Ins. L. J. 615; *Ormsby v. Laclede Ins. Co.*, 105 Mo. App. 143, 79 S. W. Rep. 733; *Nixon v. German Ins. Co.*, 69 Mo. App. 351; *Cagle v. Chilicothe Ins. Co.*, 78 Mo. App. 431; *Rickey v. German Ins. Co.*, 79 Mo. App. 485; *Montgomery v. Lebanon Ins. Co.*, 80 Mo. App. 500; *Bushnell v. Farmers' Ins. Co.*, Mo. App. , 85 S. W. Rep. 103; *Gibson v. German-American Ins. Co.*, 85 Mo. App. 41; *Ross Langford v. Mercantile Ins. Co.*, 97 Mo. App. 79, 71 S. W. Rep. 720; *City of De Soto v. American Ins. Co.*, 102 Mo. App. 1, 74 S. W. Rep. 1; *Mead v. Saratoga Ins. Co.*, 81 App. Div. 282, 80 N. Y. Supp. 885; *Hays v. Saratoga Ins. Co.*, 81 App. Div. 287, 80

N. Y. Supp. 888; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243; *Partridge v. Commercial Ins. Co.*, 17 Hun, 95; *Baker v. Home Ins. Co.*, 64 N. Y. 648; *Cornelius v. Farmers' Ins. Co.*, Iowa, , 81 N. W. Rep. 236; *Schaeffer v. Anchor Ins. Co.*, 113 Iowa, 652, 85 N. W. Rep. 985; *Parno v. Iowa Merchants' Ins. Co.*, 114 Iowa, 132, 86 N. W. Rep. 210; *Taylor v. Anchor Ins. Co.*, 116 Iowa, 625, 88 N. W. Rep. 807; *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 693, 15 Ins. L. J. 698; *Siltz v. Hawkeye Ins. Co.*, 71 Iowa, 710, 29 N. W. Rep. 605; *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; *Meyers v. Lebanon Ins. Co.*, 156 Pa. St. 420, 27 Atl. Rep. 39, 23 Ins. L. J. 308; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319, 36 N. E. Rep. 408; *American Ins. Co. v. Walston*, 111 Ill. App. 133; *Southern Ins. Co. v. Hastings*, 64 Ark. 253, 41 S. W. Rep. 1093; *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11; *Sellers v. Commercial Ins. Co.*, 105 Ala. 282, 16 So. Rep. 798, 24 Ins. L. J. 354; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Parrish v. Rosebud Mining Co.*, 140 Cal. 635, 71 Pac. Rep. 694; *Menk v. Home Ins. Co.*, 76 Cal. 50, 14 Pac. Rep. 837, 18 Pac. Rep. 117; *Insurance Co. v. Hancock*, 106 Tenn. 513, 62 S. W. Rep. 145; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. Rep. 77, 20 Ins. L. J. 481; *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. Rep. 370; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. Rep. 366; *Lynchburg Ins. Co. v. West*, 76 Va. 575, 12 Ins. L. J. 51; *Otte v. Hartford Ins. Co.*, 88 Minn. 423, 93 N. W. Rep. 608; *Kausal v. Minnesota Ins. Co.*, 31 Minn. 17, 12 Ins. L. J. 657; *Fidelity Ins. Co. v. Lowe*, Nebr. , 93 N. W. Rep. 749; *Omaha Ins. Co. v. Crighton*, 50 Nebr. 314, 69 N. W. Rep. 766, 26 Ins. L. J. 791; *State Ins. Co. v. Jordan*, 29 Nebr. 514, 45 N. W. Rep. 792, 19 Ins. L. J. 657; *Kansas Mill Owners' Ins. Co. v. Central National Bank*, 60 Kans. 630, 57 Pac. Rep. 524, 28 Ins. L. J. 741; *Manchester Assur. Co. v. Dowell*, 80 S. W. Rep. 207 (Ky.); *Germania Ins. Co. v. Wingfield*, 57 S. W. Rep. 456 (Ky.); *Western Assur. Co. v. Rector*, 85 Ky. 294; *Cleavenger v. Franklin Ins. Co.*, W. Va. , 35 S. E. Rep. 998; *Dietz v. Providence-Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. Rep. 616; *Kelly v. Troy Ins. Co.*, 3 Wis. 254; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492, 40 N. W. Rep. 386; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Parker v. Amazon Ins. Co.*, 34 Wis. 364; *Malleable Iron Co. v. Phoenix Ins. Co.*, 25 Conn. 465; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Ætna Fire & Tornado Ins. Co. v. Olmstead*, 21 Mich. 246; *Hastings Ins. Co. v. Shannon*, 2 Duval, 394 (Can. Sup. Ct.); *Mullin v. Vermont Ins. Co.*, 54

Vt. 223; *Tarbell v. Vermont Ins. Co.*, 63 Vt. 53, 22 Atl. Rep. 533, 21 Ins. L. J. 238; *Pickel v. Phoenix Ins. Co.*, 119 Ind. 291, 21 N. W. Rep. 898; *Insurance Co. v. Lewis*, 48 Tex. 622; *Texas Ins. Co. v. Stone*, 49 Tex. 4; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Packard v. Dorchester Ins. Co.*, 77 Me. 144, 15 Ins. L. J. 475; *Insurance Co. v. McGookey*, 33 Ohio St. 555.

2. *Parno v. Iowa Merchants' Ins. Co.*, Iowa, , 86 N. W. Rep. 210; *Omaha Ins. Co. v. Crighton*, 50 Nebr. 314, 69 N. W. Rep. 766, 26 Ins. L. J. 791; *Meyers v. Lebanon Ins. Co.*, 156 Pa. St. 420, 27 Atl. Rep. 39, 23 Ins. L. J. 308; *Smith v. Farmers' Ins. Co.*, 89 Pa. St. 287; *Eilenberger v. Protective Ins. Co.*, 89 Pa. St. 464; *Ormsby v. Laclede Ins. Co.*, Mo. App. , 72 S. W. Rep. 139.

3. *Sellers v. Commercial Ins. Co.*, 105 Ala. 282, 16 So. Rep. 798, 24 Ins. L. J. 354; *Fidelity Ins. Co. v. Lowe*, Nebr. , 93 N. W. Rep. 749; *Deitz v. Providence-Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. Rep. 616; *Crouse v. Hartford Ins. Co.*, 79 Mich. 249, 44 N. W. Rep. 496, 19 Ins. L. J. 343.

4. *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47, 62; *Alexander v. Germania Ins. Co.*, 66 N. Y. 464. (This specific provision was omitted from the New York standard form.)

5. *Schaeffer v. Anchor Ins. Co.*, 113 Iowa, 652, 85 N. W. Rep. 985; *Pottsville Ins. Co. v. Meekes*, 10 Ins. L. J. 717 (Pa.).

6. *People v. Howard*, 50 Mich. 239; *Partridge v. Commercial Ins. Co.*, 17 Hun, 95.

7. *American Ins. Co. v. Gallatin*, 48 Wis. 36.

RULE 22.

Broker Agent of Insured in Filling up Written Application.

Where, in an action on an insurance policy, the defense interposed is a breach of the warranty in the application, in regard to the condition and situation of the property insured, and it is shown that the plaintiff applied for his insurance to an insurance broker, who wrote down the answers of plaintiff to the questions contained in the application, and there is no evidence that said broker was the agent of the defendant when he prepared the application, but it affirmatively appears that the broker was the agent of the plaintiff,

evidence that at the time of making the application the plaintiff did not make the statement contained therein, with reference to the property to be insured, is inadmissible; the misrepresentation, being the act of the insured or his agent, renders the policy void.

Sellers v. Commercial Ins. Co., 105 Ala. 282, 16 So. Rep. 798, 24 Ins. L. J. 354. And see *Draper v. Charter Oak Ins. Co.*, 2 Allen, 569 (Mass.); *Sexton v. Montgomery Ins. Co.*, 9 Barb. 191, where it is held a surveyor might be agent of both parties under special language; *Liberty Hall Assoc. v. Housatonic Ins. Co.*, 7 Gray, 261 (Mass.); *Fame Ins. Co. v. Thomas*, 10 Bradw. 545 (Ill.).

RULE 23.

Effect of Statute Requiring Written Application to be Incorporated Into Policy.

When a statute requires that a written application shall be incorporated into the policy, reference to the application and statement that it forms part of the policy are insufficient to create a warranty;¹ and when reference is thus made the insurance company will not be permitted to defeat a recovery by treating the application as a representation,² or by claiming concealment as to matter covered by such application.³

1. *Coleman v. Retail Lumbermen's Ins. Assoc.*, 77 Minn. 31, 79 N. W. Rep. 588, 28 Ins. L. J. 650; *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1, 10 Ins. L. J. 354.

2. *Taylor v. Ætna Ins. Co.*, 120 Mass. 254.

3. *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492, 40 N. W. Rep. 386.

RULE 24.

Statutory Requirements Must be Complied With.

Under the Pennsylvania statute a copy of the application must be attached to the policy in order to be ad-

missible in evidence;¹ and to be made part thereof must be signed.² And so under the Wisconsin statute.³

1. *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460; *Hebb v. Kittanning Ins. Co.*, 138 Pa. St. 174, 20 Ins. L. J. 92.

2. *Susquehanna Ins. Co. v. Hallock*, 14 Atl. Rep. 167 (Pa.).

3. *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492, 40 N. W. Rep. 386.

The Pennsylvania statute, requiring an application for insurance to be attached or annexed to the policy when issued and delivered to the insured, is limited to applications in writing and does not apply to an oral application.

Lenox v. Greenwich Ins. Co., 165 Pa. St. 575, 30 Atl. Rep. 940.

RULE 25.

Defective Copy, Summary, or Abstract not Accepted as Substitute.

When a statute requires a copy of an application to be made part of or annexed to the policy, a defective copy or a summary or abstract will not be accepted as a substitute.

Corson v. Anchor Ins. Co., 113 Iowa, 641, 85 N. W. Rep. 806; *Corson v. Iowa Mutual Ins. Co.*, 115 Iowa, 485, 88 N. W. Rep. 1086.

RULE 26.

When Warranty Established no Question as to Materiality.

When a warranty is established the question of materiality is eliminated; the only question is whether the statement or representation is true or false, or whether there has been a compliance or noncompliance,¹ unless the warranty is qualified by a limitation as to its materiality.² But materiality is not an open question under general words of limitation when a specific inquiry makes it material as matter of contract.³ And so, when policy in terms provides that any

untrue statement in an application shall void it, the question of materiality is not an open one as to any untrue statement.⁴

1. *Germier v. Springfield F. & M. Ins. Co.*, 109 La. 341, 33 So. Rep. 361; *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. Rep. 595, 28 Ins. L. J. 402; *Capital City Ins. Co. v. Autrey*, 105 Ala. 269, 17 So. Rep. 326; *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. Rep. 922, 25 Ins. L. J. 561; *Cerys v. State Ins. Co.*, 71 Minn. 338, 73 N. W. Rep. 849, 27 Ins. L. J. 258; *Planters' Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. Rep. 44; *Maddox v. Dwelling-House Ins. Co.*, 56 Mo. App. 343; *Lama v. Dwelling-House Ins. Co.*, 51 Mo. App. 447; *Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1; *Baxter v. State Ins. Co.*, 65 Mo. App. 255; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Aurora Ins. Co. v. Eddy*, 55 Ill. 213; *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420, 12 Ins. L. J. 569; *Thomas v. Fame Ins. Co.*, 108 Ill. 91, 13 Ins. L. J. 257; *Connecticut Ins. Co. v. Pyle*, 44 Ohio St. 19; *Pierce v. Empire Ins. Co.*, 62 Barb. 636; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136. And see *Johnson v. Dakota Ins. Co.*, 1 N. D. 167, 45 N. W. Rep. 799.

2. *Parker v. Bridgeport Ins. Co.*, 10 Gray, 302 (Mass.); *Elliott v. Hamilton Ins. Co.*, 13 Gray, 139 (Mass.); *Aetna Ins. Co. v. Grube*, 6 Minn. 82; *Garcelon v. Hampden Ins. Co.*, 50 Me. 580.

3. *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. 84; *Cox v. Aetna Ins. Co.*, 29 Ind. 586; *Cuthbertson v. North Carolina Ins. Co.*, 96 N. C. 480.

4. *Co-operative Assoc. v. Leflore*, 53 Miss. 1; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Farmers' Ins. Co. v. Curry*, 13 Bush, 312, 6 Ins. L. J. 733 (Ky.).

Many of the old forms of policy provided that "false representations by the assured of the condition, situation or occupancy of the property, or any omission to make known any fact material to the risk, or an overvaluation, or any misrepresentation whatever either in the written application or otherwise," should render it void. And it was held that all representations were thereby in legal effect warranties, without regard to materiality, while omissions to state any fact had such effect only when material to the risk.

American Ins. Co. v. Gilbert, 27 Mich. 429. And see *Graham v. Firemen's Ins. Co.*, 87 N. Y. 69, 11 Ins. L. J. 64.

This clause or provision was not inserted in the standard forms.

Under the Georgia statute a breach of warranty to avoid the policy must be founded upon such facts as to change the nature or extent or character of the risk.

Rosser v. Georgia Home Ins. Co., 101 Ga. 716, 29 S. E. Rep. 286; *Mobile Fire Department v. Miller*, 58 Ga. 420; *Phenix Ins. Co. v. Fulton*, 80 Ga. 224, 4 S. E. Rep. 866.

A statement by the insured in his application made part of the policy that the risk has not been refused by any other company, and that no other company has canceled its contract, constitutes a warranty under the Ontario Insurance Act, and the only point for a jury's decision is as to its truth.

Scott v. London & L. Ins. Co., 21 Ont. 312.

RULE 27.

Effect of Statute Requiring Examination of Property Before Policy Issues.

When statute requires the insurance company to cause a personal examination of the property to be made, and a full description to be given, and its insurable value fixed in the policy, statements in an application as to condition or value of the property become immaterial.

Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. Rep. 1072, 19 Ins. L. J. 673.

RULE 28.

Knowledge of Company When Policy Issues May be Element of Estoppel.

The knowledge of the company or its agent, when policy issues, of facts constituting a breach of warranty may operate as an element of estoppel preventing a forfeiture of the insurance,¹ but this rule may not apply where limitation upon the agent's authority, or that it was vested in a certain officer, was brought home to or known by the assured.²

1. *Michigan Shingle Co. v. State Investment Ins. Co.*, 94 Mich. 389, 53 N. W. Rep. 945, 22 Ins. L. J. 241; *Same v. Penn-*

sylvania Ins. Co., 98 Mich. 609, 57 N. W. Rep. 802; *Duby v. Farmers' Ins. Co.*, 133 Mich. 661, 95 N. W. Rep. 720; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. Rep. 475; *Dowling v. Merchants' Ins. Co.*, 168 Pa. St. 234, 31 Atl. Rep. 1087, 24 Ins. L. J. 795; *Scott v. German Ins. Co.*, 69 Mo. App. 337; *Liverpool, L. & G. Ins. Co. v. Farnsworth Lumber Co.*, 72 Miss. 555, 17 So. Rep. 445, 24 Ins. L. J. 876; *Patten v. Merchants' Ins. Co.*, 40 N. H. 375; *Continental Ins. Co. v. Kasey*, 25 Gratt. 268 (Va.); *Simmons v. Insurance Co.*, 8 W. Va. 474; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737, 15 Ins. L. J. 490; *Phoenix Ins. Co. v. Padgitt*, 42 S. W. Rep. 800 (Tex. Civ. App.).

2. *Cagle v. Chilicothe Ins. Co.*, 78 Mo. App. 215.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 8, 12, 16.

The Texas statute defining the status of a soliciting agent, does not confer authority upon such an agent to waive a breach of warranty contained in an application made part of an accepted policy.

Hartford Ins. Co. v. Walker, 94 Tex. 473, 61 S. W. Rep. 711, rev'g 60 S. W. Rep. 820 (Tex. Civ. App.).

RULE 29.

Mere Knowledge by Company Does Not Relieve Insured — Must be Elements of Estoppel or Fraud.

Mere knowledge by company's agent of the falsity of a warranty entered into by the insured in terms expressed in the policy does not relieve the insured from the consequences of a breach;¹ there must be in connection elements of an estoppel in the filling up or preparation of a written application made a warranty whereby assured is misled,² or the issue and delivery of the policy as a valid instrument would operate as a fraud upon him.³

1. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52, 56; *Alexander v. Germania Ins. Co.*, 66 N. Y. 464, 467; *Franklin Ins. Co. v. Martin*, 11 Vroom, 568 (N. J.); *Commonwealth Ins. Co. v. Huntzinger*, 98 Pa. St. 41, 10 Ins. L. J. 618; *Vose v. Eagle Ins. Co.*, 6 Cush. 42 (Mass.).

2. See *Chase v. Hamilton Ins. Co.* and *Alexander v. Germania Ins. Co.*, *supra*, where the distinction is pointed out; *Smith v. Farmers' Ins. Co.*, 89 Pa. St. 287; *State Ins. Co. v. Gray*, 44 Kans. 731, 25 Pac. Rep. 197, 20 Ins. L. J. 128; *Sullivan v. Phenix Ins. Co.*, 34 Kans. 170; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308, 14 Ins. L. J. 365; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; *Susquehanna Ins. Co. v. Cusick*, 109 Pa. St. 157; *Phenix Ins. Co. v. Weeks*, 45 Kans. 751, 26 Pac. Rep. 410, 20 Ins. L. J. 541; *Thomas v. Hartford Ins. Co.*, 20 Mo. App. 150; *Wheaton v. North B. & M. Ins. Co.*, 76 Cal. 415, 18 Pac. Rep. 758; *Copeland v. Dwelling-House Ins. Co.*, 77 Mich. 554, 43 N. W. Rep. 991; *German Ins. Co. v. Gray*, 43 Kans. 497, 23 Pac. Rep. 637. And see Rules 15-21.

3. *Kister v. Lebanon Ins. Co.*, 128 Pa. St. 553, 18 Atl. Rep. 447; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570, 23 N. E. Rep. 498, 19 Ins. L. J. 492; *Phenix Ins. Co. v. Golden*, 121 Ind. 524, 23 N. E. Rep. 503, 19 Ins. L. J. 560; *Johnson v. Dakota Ins. Co.*, 1 N. D. 167, 45 N. W. Rep. 799; *Phenix Ins. Co. v. Stark*, 120 Ind. 444, 22 N. E. Rep. 413, 19 Ins. L. J. 208; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. Rep. 333, 19 Ins. L. J. 966; *Partridge v. Commercial Ins. Co.*, 17 Hun, 95. And see Rule 28, and references in note.

Mere knowledge of company's agent when policy issues is inoperative as evidence of waiver of a breach of warranty.

Kennedy v. St. Lawrence Ins. Co., 10 Barb. 285; *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *Bartean v. Phoenix Life Ins. Co.*, 67 N. Y. 595; *Tebbetts v. Hamilton Ins. Co.*, 3 Allen, 569 (Mass.); *Shannon v. Gore District Ins. Co.*, 37 Up. Can. Q. B. 380; *Jennings v. Chenango Ins. Co.*, 2 Den. 75 (N. Y.).

These cases are supposed to be substantially overruled by subsequent decisions in New York and elsewhere. The distinction between the question of the admission of parol evidence to alter or change a written contract, and its admission to sustain a claim of estoppel or fraud, has not been always noted or considered. The courts all over the country would probably agree on the proper exclusion of such evidence on the former theory or legal principle. If offered to sustain estoppel or fraud a different question arises, and here is where the point of distinction and difference arises.

That knowledge of company's agent when policy issues of fact constituting a breach of warranty, does not prevent a forfeiture, see also *Pottsville Ins. Co. v. Fromm*, 100 Pa. St. 347, 12 Ins. L. J. 21; *Commonwealth Ins. Co. v. Huntzinger*, 98 Pa. St. 41; *Franklin Ins. Co. v. Martin*, 11 Vroom, 568 (N. J.).

And see and compare Vol. 1, Fire Insurance as Valid Contract, "Waiver," Rules 8, 12, and 16. And as to distinction between waiver and estoppel, same, Rule 6. Also this volume, chapter on "Agents."

RULE 30.

Admissibility of Parol Evidence.

Evidence of verbal statements when policy issued by company's agent is not admissible to change an express warranty or part of the written contract;¹ parol evidence is not admissible to vary or explain the terms of a warranty when there is no ambiguity,² but may be admissible when there is ambiguity.³

1. *Arguimbau v. Germania Ins. Co.*, 106 La. 139, 30 So. Rep. 148.

2. *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Sheldon v. Hartford Ins. Co.*, 22 Conn. 235; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Hovey v. American Ins. Co.*, 2 Duer, 554 (N. Y.); *Birmingham v. Empire Ins. Co.*, 42 Barb. 457; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136.

3. *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Smith v. Farmers' Ins. Co.*, 89 Pa. St. 287, 8 Ins. L. J. 828; *Guardian Ins. Co. v. Connelly*, 20 Can. S. C. 208.

RULE 31.

Knowledge of Broker or Agent of Insured.

The knowledge of a broker or agent of insured who places the risk cannot operate as an element of waiver by the insurance company of a breach of warranty.

Northrup v. Piza, 43 App. Div. 284, 60 N. Y. Supp. 363, aff'd, 167 N. Y. 578.

RULE 32.

Waiver as Applicable to a Promissory Warranty.

When warranty is continuing or promissory on part of the insured there is no waiver or estoppel created

by mere knowledge or declaration of the company's agent when policy issues.¹ An express promissory warranty is not waived by silence or inaction of the insurance company, though it may have knowledge of its violation or breach.² Knowledge of the company's agent when policy issues may operate as a waiver to extent of allowing the insured who accepts the policy a reasonable time to comply with its provisions.³

1. *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. Rep. 425, 24 Ins. L. J. 47; *Cedar Rapids Ins. Co. v. Shimp*, 16 Bradw. 248 (Ill.); *Michigan Shingle Co. v. London & Lancashire Ins. Co.*, 91 Mich. 441, 51 N. W. Rep. 1111; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101.

2. *Petit v. German Ins. Co.*, 98 Fed. Rep. 800; *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 223, 51 Pac. Rep. 174, 26 Ins. L. J. 969; *Liverpool, L. & G. Ins. Co. v. Richardson Lumber Co.*, 11 Okla. 579, 69 Pac. Rep. 936, 938; *Sun Ins. Co. v. Texarkana Foundry Co.*, 15 S. W. Rep. 34, 20 Ins. L. J. 856 (Tex.).

3. *Hartford Ins. Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. Rep. 140.

RULE 33.

Waiver by Agent After Issue of Policy.

When the policy limits the power and authority of the agent to the making of written indorsements or consent only by writing he cannot, after the issue and delivery of the policy, in the absence of special authority, orally waive or dispense with an express warranty.

Medley v. German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. Rep. 101.

That same may be modified or changed by oral agreement after issue of the policy, see *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, 84 S. W. Rep. 551 (Ky.).

The courts are divided upon this rule. The subject is more fully considered in this volume in the chapter on "Agents."

And see Vol. 1, Fire Insurance as a Valid Contract, "Waiver," Rules 27, 28.

RULE 34.

Relating to Situation, Condition, or Occupation of Building — Construction — Ambiguity.

Specific exact statement or description of certain situation, condition, use, or occupation relating to the risk amounts to a warranty that the building is so situated, is occupied, or so occupied, or so used;¹ but this rule will not be extended by construction beyond the plain meaning of the language.² Ambiguity is explainable by testimony.³

1. *Wall v. East River Ins. Co.*, 7 N. Y. 370; *Burleigh v. Gebhard Ins. Co.*, 90 N. Y. 220, 12 Ins. L. J. 141; *Alexander v. Germania Ins. Co.*, 66 N. Y. 464; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, 288; *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Merwin v. Star Ins. Co.*, 7 Hun, 659, aff'd, 72 N. Y. 603, without opinion; *Farmers' Ins. Co. v. Curry*, 13 Bush, 312 (Ky.); *Dewees v. Manhattan Ins. Co.*, 6 Vroom, 366 (N. J.); *Franklin Ins. Co. v. Martin*, 40 N. J. L. 568; *Greenwich Ins. Co. v. Dougherty*, 64 N. J. L. 716, 42 Atl. Rep. 485, 46 id. 1099; *Texas Ins. Co. v. Stone*, 49 Tex. 4; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 16 S. W. Rep. 479; *Pottsville Ins. Co. v. Fromm*, 100 Pa. St. 347, 12 Ins. L. J. 21; *Pottsville Ins. Co. v. Horan*, 89 Pa. St. 438; *Baker v. German Ins. Co.*, 124 Ind. 490, 24 N. E. Rep. 1041, 19 Ins. L. J. 802; *Aiple v. Boston Ins. Co.*, 92 Minn. 337, 109 N. W. Rep. 8; *Thomas v. Commercial Union Ins. Co.*, 162 Mass. 29, 37 N. E. Rep. 672; *Goddard v. Monitor Ins. Co.*, 108 Mass. 56; *Cerf v. Home Ins. Co.*, 44 Cal. 320; *Jackson v. St. Paul Ins. Co.*, 33 Hun, 60, rev'd, 99 N. Y. 124, on other grounds; *Hamburg-Bremen Ins. Co. v. Lewis*, 4 App. Cas. D. C. 66; *Thomas v. Fame Ins. Co.*, 108 Ill. 91, 13 Ins. L. J. 257; *Warshawsky v. Anchor Mutual Ins. Co.*, 98 Iowa, 221, 67 N. W. Rep. 237.

2. *Keeney v. Home Ins. Co.*, 71 N. Y. 396; *Burleigh v. Gebhard Ins. Co.*, *supra*; *National Bank v. Union Ins. Co.*, 88 Cal. 497, 26 Pac. Rep. 509; *Fire Assoc. v. Colgin*, Tex. Civ. App. , 33 S. W. Rep. 1004. And see *Greenwich Ins. Co.*

v. Dougherty, 64 N. J. L. 716, 42 Atl. Rep. 485; *Stebbins v. Globe Ins. Co.*, 2 Hall, 632 (N. Y.). See Rule 5.

3. *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240; *Smith v. Farmers' Ins. Co.*, 89 Pa. St. 287, 8 Ins. L. J. 828.

RULE 35.

Building as Affected by Description.

Description of a building as a dwelling does not amount to a warranty that it is occupied;¹ and occupation as a boarding-house does not constitute a breach.² So description of a building as a "sawmill building,"³ or as a "storehouse,"⁴ does not amount to a warranty of occupation as such.

1. *Cumberland Ins. Co. v. Douglas*, 58 Pa. St. 419; *Niagara Ins. Co. v. Johnson*, 4 Kans. App. 16, 45 Pac. Rep. 789; *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Hill v. Hibernia Ins. Co.*, 10 Hun, 26; *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 133.

2. *Planters' Ins. Co. v. Sorrels*, 60 Tenn. 352.

3. *Frost Works v. Millers' Ins. Co.*, 37 Minn. 300, 34 N. W. Rep. 35.

4. *Franklin Ins. Co. v. Brock*, 57 Pa. St. 74; *Dolliver v. St. Joseph Ins. Co.*, 131 Mass. 39.

RULE 36.

Effect of Warranty as to Occupation — Breach by Tenant.

When the description amounts to a warranty as to the occupation, the insured cannot commit the control of the premises to another and avoid responsibility, on the ground of want of notice or knowledge. He is presumed to have notice, whether the premises are occupied by himself or a tenant.

Allen v. Home Ins. Co., 133 Cal. 29, 65 Pac. Rep. 138. And see *Liverpool, L. & G. Ins. Co. v. Gunther*, 116 U. S. 113, 15 Ins. L. J. 161, rev'g 20 Blatchf. 362.

RULE 37.

When Breach as to Occupation.

“ Occupied for a grist mill ” operates as a warranty, and when in fact it is also occupied for carpenter’s work there is a breach;¹ as a “ dwelling-house,” when part is used as a billiard-room and restaurant, there is a breach;² “ occupied as a hotel,” when in fact occupied as a saloon, there is a breach;³ “ filled in with brick ” is a warranty, and if untrue voids the policy;⁴ description as “ broom-handle factory,” when in fact also a shingle mill or factory, there is a breach;⁵ if policy warrants that the insured will keep a barrel full of water and two buckets in same room, and within ten feet of gin stand insured, there is a breach if kept in a place inaccessible at time of fire.⁶

1. *Jennings v. Chenango County Ins. Co.*, 2 Den. 75 (N. Y.).
2. *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. 479.
3. *Baker v. German Ins. Co.*, 124 Ind. 490, 24 N. E. Rep. 1041, 19 Ins. L. J. 802.
4. *Fowler v. Ætna Ins. Co.*, 6 Cow. 673 (N. Y.).
5. *Thomas v. Fame Ins. Co.*, 108 Ill. 91, 13 Ins. L. J. 257.
6. *Mechanics’ Ins. Co. v. Thompson*, 57 Ark. 279, 21 S. W. Rep. 468, 22 Ins. L. J. 383.

RULE 38.

Warranty as to Distance of Buildings.

If, in answer to a question as to “ distance from other buildings if less than a certain number of feet or rods,” the insured states all the “ nearest ” buildings on each side without mentioning all, it does not amount to a warranty that there are no others within the distance mentioned in the question;¹ but when the question also calls for distance from *each* within the stated

distance, and the answer, without qualifying as “ nearest,” mentions some but not all, then there is a breach;² and so there is a breach when the answer is “ bounded by space on all sides;”³ and so there is a breach when the insured states the number of feet between buildings on a diagram, and same is untrue,⁴ or undertakes by diagram, in reply to specific question, to show all buildings within certain distance and does not do so.⁵ When distance between buildings is made a warranty, if less than stated, there is a breach.⁶

1. *Gates v. Madison County Ins. Co.*, 2 N. Y. 43, 5 N. Y. 469; *Masters v. Madison County Ins. Co.*, 11 Barb. 624.

2. *Burritt v. Saratoga Ins. Co.*, 5 Hill, 188; *Wilson v. Herkimer Ins. Co.*, 6 N. Y. 53. And see *Gates v. Madison Ins. Co.*, *supra*, where the distinction is pointed out; *Frost v. Saratoga Ins. Co.*, 5 Den. 154 (N. Y.); *Chaffee v. Cattaraugus Ins. Co.*, 18 N. Y. 376; *Day v. Conway Ins. Co.*, 52 Me. 60.

3. *Jennings v. Chenango Ins. Co.*, 2 Den. 75 (N. Y.).

4. *Gilligan v. Commercial Ins. Co.*, 20 Hun, 93, *aff'd*, 87 N. Y. 626, without opinion; *Thomas v. Fame Ins. Co.*, 108 Ill. 91, 13 Ins. L. J. 257.

5. *Tebbetts v. Hamilton Ins. Co.*, 1 Allen, 305 (Mass.).

6. *Mamlok v. Franklin*, 65 N. Y. 556.

RULE 39.

Distinction Between Affirmative and Promissory Warranties — Latter not Created by Implication or Construction — Promissory Warranty Must be Complied With.

While descriptive words of actual specific condition, use, or occupation may amount to a warranty as to present or existing condition, use, or occupation, when policy issues, they do not extend to future or continued condition, use, or occupation, unless such intent is expressed in plain, unambiguous terms. An affirmative warranty will not be converted into a promis-

sory warranty by implication or construction.¹ But of course this rule does not prevent a defense founded on violation of conditions in policy or an increase of hazard.² And when a promissory warranty is established it must be complied with or policy becomes void.³

1. *East Texas Ins. Co. v. Kempner*, 12 Tex. Civ. App. 534, 34 S. W. Rep. 393, writ of error denied, 35 S. W. Rep. 1069. And see previous appeal, 87 Tex. 229; *Driscoll v. German-American Ins. Co.*, 74 Hun, 153, 26 N. Y. Supp. 646; *O'Neill v. Buffalo Ins. Co.*, 3 N. Y. 122; *Smith v. Mechanics & Traders' Ins. Co.*, 32 N. Y. 399; *Stout v. City Ins. Co.*, 12 Iowa, 371; *Hosford v. Germania Ins. Co.*, 127 U. S. 399; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605; *Hartford Ins. Co. v. Smith*, 3 Colo. 422; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. Rep. 333, 19 Ins. L. J. 966; *Evans v. Queen Ins. Co.*, 5 Ind. App. 198, 31 N. E. Rep. 843; *Blood v. Howard Ins. Co.*, 12 Cush. 472 (Mass.); *Underhill v. Agawam Ins. Co.*, 6 Cush. 440; *New England Ins. Co. v. Wetmore*, 32 Ill. 221; *Schmidt v. Peoria Ins. Co.*, 41 Ill. 295; *Gilliat v. Pawtucket Ins. Co.*, 8 R. I. 282; *Grubbs v. Virginia Ins. Co.*, 110 N. C. 108, 14 S. E. Rep. 516, 21 Ins. L. J. 470; *United States Ins. Co. v. Kimberly*, 34 Md. 224; *May v. Buckeye Ins. Co.*, 25 Wis. 291; *Simmons v. Insurance Co.*, 8 W. Va. 474; *Frisbie v. Fayette Ins. Co.*, 27 Pa. St. 325; *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Deweese v. Manhattan Ins. Co.*, 6 Vroom, 366 (N. J.); *Imperial Ins. Co. v. Kiernan*, 83 Ky. 468, 15 Ins. L. J. 352; *Aurora Ins. Co. v. Eddy*, 55 Ill. 213. See Rule 5.

2. *German Ins. Co. v. Hart*, 16 Ky. L. R. 344. And see *Billings v. Tolland County Ins. Co.*, 20 Conn. 139.

The courts do not appear to agree in construction of the words " * * * while occupied " as * * * That they do not create a continuing warranty, see *East Texas Ins. Co. v. Kempner*, *supra*.

That they do, see *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. Rep. 138.

3. *Murdoch v. Chenango Ins. Co.*, 2 N. Y. 210; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, 587; *City of Worcester v. Worcester Ins. Co.*, 9 Gray, 27; *Wilson v. Hampden Ins. Co.*, 4 R. I. 159.

RULE 40.

**Compliance With and Construction of Promissory Warranty —
Question of Fact or Law.**

Whether or not there has been a compliance with a promissory warranty may be a question of fact proper to be determined by a jury, but the construction of the writing and its application to a certain state of facts is a question of law to be determined by the court;¹ the construction of a promissory warranty may require substantial as distinguished from literal or exact compliance,² and if open to construction by the court it favors the insured.³

1. *Poor v. Humboldt Ins. Co.*, 125 Mass. 274; *Bennett v. Agricultural Ins. Co.*, 51 Conn. 504, 13 Ins. L. J. 817. And see *Allen v. Charleston Ins. Co.*, 5 Gray, 384 (Mass.); *Houghton v. Manufacturers' Ins. Co.*, 8 Metc. 114 (Mass.).

2. *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Cady v. Imperial Ins. Co.*, 4 Cliff. 203 (U. S.); *Wynne v. Liverpool, L. & G. Ins. Co.*, 71 N. C. 121; *Andes Ins. Co. v. Shipman*, 77 Ill. 189; *Simmons v. Insurance Co.*, 8 W. Va. 474; *Copp v. German-American Ins. Co.*, 51 Wis. 637.

3. *North Berwick Co. v. New England Ins. Co.*, 52 Me. 336. And see Rule 5.

RULE 41.

**When Insured Has Reasonable Time to Comply With Promissory
Warranty — Question of Fact or Law.**

When warranty is promissory in character and, either on its face or with knowledge of company's agent, requires time for compliance, insured is entitled to reasonable time to comply with his agreement, and the question as to what is reasonable time is one of fact according to the circumstances, proper to be determined by a jury;¹ but when facts are estab-

lished or undisputed the question of reasonable time is one of law to be determined by the court.²

1. *Lindsey v. Union Ins. Co.*, 3 R. I. 157; *Hartford Ins. Co. v. Post*, 25 Tex. Civ. App. 428, 62 S. W. Rep. 140; *Hough v. City Ins. Co.*, 29 Conn. 10.

2. *Swan v. Watertown Ins. Co.*, 96 Pa. St. 37, 10 Ins. L. J. 392.

RULE 42.

Construction of Promissory Warranty — Building in Course of Erection — Mill Run Only Part of the Year.

When a promissory warranty applies to a building in course of erection it must be construed with reference to the existing state of the building, and requires performance only accordingly with reasonable diligence, having regard to the progress of the building; the same degree of performance may not be required from the first moment policy issues as would or might be the case if building finished;¹ so when promissory warranty applies to a mill or factory only run part of the year it may be construed as applicable only to the condition when running in usual course of business, and company may be liable during idle season.²

1. *Gloucester Ins. Co. v. Howard Ins. Co.*, 5 Gray, 497 (Mass.). And see *Frost Works v. Millers' Ins. Co.*, 37 Minn. 300, 34 N. W. Rep. 35.

2. *May v. Buckeye Ins. Co.*, 25 Wis. 291.

RULE 43.

Promissory Warranty as Affected by Impossibility of Exact Performance.

While, from construction of the language of a promissory warranty, in accordance with a reasonable in-

tent as to a possibility from natural or unavoidable causes, it might be impossible to literally comply therewith, as, for instance, the freezing of water in buckets kept for purpose of extinguishing fire, that does not relieve the insured from having the required number of buckets, in serviceable condition, at designated place ready for instant use.

Aurora Ins. Co. v. Eddy, 49 Ill. 106, 55 Ill. 213.

RULE 44.

Construction of "Detached"—Effect of Specific Statement as to Exposures.

When the warranty is that a certain building is situate "detached at least one hundred feet," it means that no other building, of such size and character as to constitute an exposure and increase the risk, stood within 100 feet, and whether there is or not such other building within the prescribed distance may be a question of fact;¹ a small hoghouse or henhouse is not a building within meaning of that word in an application stating distance of exposures,² but, when insured, states expressly that "all exposures within ten rods are mentioned," it is error to submit to a jury whether certain buildings within the prescribed distance were "exposures."³

1. *Burleigh v. Gebhard Ins. Co.*, 90 N. Y. 220, 12 Ins. L. J. 141; *Baldwin v. Citizens' Ins. Co.*, 60 Hun, 389, 39 N. Y. Supp. 752.

2. *White v. Mutual Assur. Co.*, 8 Gray, 566 (Mass.).

3. *Chaffee v. Cattaraugus Ins. Co.*, 18 N. Y. 376.

RULE 45.

Application of Warranty to New Location.

When description of use as a dwelling operates as a warranty, it applies to new location for which permission is given, and the use of a part of the building as a grocery store in the new location constitutes a breach and voids the policy;¹ but this rule may not apply when the undisclosed or new use is not incompatible with the described use.²

1. *Greenwich Ins. Co. v. Dougherty*, 64 N. J. L. 716, 42 Atl. Rep. 485, 46 id. 1099.

2. *Greenwich Ins. Co. v. Dougherty*, *supra*. And see *Billings v. Tolland County Ins. Co.*, 20 Conn. 139.

RULE 46.

Construction of Statement as to Occupation as Affected by Condition When Policy Issues.

When the policy describes the property insured as "occupied by the assured as a distillery," and the distillery has been standing idle for about two years, and is not in operation when policy issues, or at the time of the fire, the insured having an office on the premises which he occupied and in which he slept, the company insures an occupied idle distillery; and cannot plead ignorance of the palpable condition of the property, when policy issues, when there is no claim or pretense of fraud, misrepresentation, or concealment.

Louck v. Orient Ins. Co., 176 Pa. St. 638, 33 L. R. A. 712, 35 Atl. Rep. 247.

RULE 47.

Construction of Warranty as to Watchman.

When the policy warrants or requires a watchman to be kept on duty all hours of the night, or that a

constant watch shall be kept, or at all times when a mill or factory is not in operation, it does not mean that he shall be constantly and continuously present watching; ordinary care is what is required, and a mere temporary cessation of watching for several hours does not constitute a breach of the warranty nor void the policy.¹ It is construed as a condition subsequent to accord with a reasonable presumption as to intent under all the circumstances. It does not require mathematically strict and exact compliance, nor does it imply an agreement that the watchman will never neglect his duty in the slightest particular, hence the mere leaving of the premises for two hours does not, as a matter of law, create a breach or void the policy.² Nor does the mere fact that the watchman is asleep on the premises when the fire breaks out constitute a breach,³ unless the insured had notice of unfitness or had not observed ordinary care in employing and keeping him.⁴

1. *London & Lancashire Ins. Co. v. Gerteson*, 106 Ky. 815, 51 S. W. Rep. 617; *Hanover Ins. Co. v. Gustin*, 40 Nebr. 828, 59 N. W. Rep. 375, 23 Ins. L. J. 651; *McGannon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 71 S. W. Rep. 160; *McGannon v. Michigan Millers' Ins. Co.*, 127 Mich. 636, 87 N. W. Rep. 61; *Au Sable Lumber Co. v. Detroit Ins. Co.*, 89 Mich. 407, 50 N. W. Rep. 870, 21 Ins. L. J. 311; *Kansas Mill Owners' Ins. Co. v. Metcalf*, 59 Kans. 383, 53 Pac. Rep. 68. And see *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. Rep. 277, 25 Ins. L. J. 36; *Hovey v. American Ins. Co.*, 2 Duer, 554 (N. Y.); *Sierra Milling Co. v. Hartford Ins. Co.*, 76 Cal. 235, 18 Pac. Rep. 267.

2. *McGannon v. Millers' Nat. Ins. Co.*, 171 Mo. 143, 71 S. W. Rep. 160; *Kansas Mill Owners' Ins. Co. v. Metcalf*, 59 Kans. 383, 53 Pac. Rep. 68.

3. *Burlington Ins. Co. v. Coffman*, 13 Tex. Civ. App. 439, 35 S. W. Rep. 406; *Phoenix Ins. Co. v. Coffman*, 10 Tex. Civ.

App. 631, 32 S. W. Rep. 810. And see *McGannon v. Michigan Millers' Ins. Co.*, 127 Mich. 636, 87 N. W. Rep. 61.

4. *Burlington Ins. Co. v. Coffman*, *supra*.

RULE 48.

**Limitation as to Construction of Warranty as to Watchman —
Effect of Possession by Sheriff.**

The last rule of construction as to warranty in keeping a watchman is not to be extended beyond reasonable bounds to relieve the insured; hence a watchman who, during the night, visits an insured mill twice, and the rest of the night sleeps in a house from which the mill is only partially visible, is not a substantial nor sufficient compliance with the obligation of the insured to keep a watchman on duty constantly day and night; and a statutory provision that the insurance company is not exonerated by negligence of the insured or of his agents does not relieve the insured from consequences of the breach.¹ And so there is a breach when watchman leaves the premises night before the fire which occurs the following morning.² A levy and taking possession by a deputy sheriff does not relieve the insured from his obligation to keep a watchman.³

1. *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548, 44 Pac. Rep. 922, 25 Ins. L. J. 561. And see *Trojan Mining Co. v. Firemen's Ins. Co.*, 67 Cal. 27; *Wenzel v. Commercial Ins. Co.*, 67 Cal. 438, 14 Ins. L. J. 625, 809; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. Rep. 872, 20 Ins. L. J. 844.

2. *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn. 19. And see *Sheldon v. Hartford Ins. Co.*, 22 Conn. 235.

3. *First Nat. Bank v. Insurance Co. N. A.*, 50 N. Y. 45.

RULE 49.

Ambiguous or Doubtful Statements as to Watchman.

Doubtful statement in an application by the insured in regard to a watchman may be modified or qualified

by an oral understanding or agreement between the agent who filled it up and the insured, that it should be deemed complied with by service of a watchman employed in that capacity in a sawmill situated in sight of and not more than sixty or seventy yards from the property insured;¹ but such evidence is not admissible to change language of a plain contract.²

1. *Farmers' Ins. Assoc. v. Williams*, 95 Va. 248, 28 S. E. Rep. 214. And see *Malleable Iron Co. v. Phoenix Ins. Co.*, 25 Conn. 465, where relief was obtained by the insured in equity.

2. *Hovey v. American Ins. Co.*, 2 Duer, 554 (N. Y.); *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136. And see Rule 5.

RULE 50.

Warranty as to Watchman not Created nor Extended by Construction.

A warranty as to watchman will not be created or extended by construction, and when in terms the understanding and agreement is that a watchman shall be employed, it is not a warranty that one shall be kept on the premises and does not prevent a recovery unless the fire was due to the failure to keep the agreement as made,¹ nor does the statement "watchman kept on the premises" require constant watch and is complied with by exercise of ordinary care according to usage.² One who performs the duties of a watchman answers the requirements though not called such.³

1. *Hart v. Niagara Ins. Co.*, 9 Wash. 620, 38 Pac. Rep. 213.

2. *Crocker v. People's Ins. Co.*, 8 Cush. 79 (Mass.).

3. *Au Sable Lumber Co. v. Detroit Ins. Co.*, 89 Mich. 407, 50 N. W. Rep. 870, 21 Ins. L. J. 311. And see Rules 5, 47, 48.

RULE 51.**When Insured Has Reasonable Time to Comply.**

If policy issue with a warranty that a watchlock should be kept on the premises, the agent of the insurance company knowing that there is none kept at the time, the insured has a reasonable time to procure it.

Phoenix Ins. Co. v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. Rep. 810. See Rule 41.

RULE 52.**Warranty of no Regular Watchman.**

When warranty is "no regular watchman, but one or two hands slept in the mill," the insured is bound to substantial compliance by having one or two of his employees lodge in the mill each night;¹ but when, in answer to question "Who sleeps in the store?" insured states "there is a watchman upon the premises all night," it is not a warranty that such watchman will continue to sleep upon the premises.²

1. *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622, 48 Wis. 535.

2. *Virginia F. & M. Ins. Co. v. Buck*, 88 Va. 517, 18 S. E. Rep. 973.

RULE 53.**When Compliance With Warranty as to Watchman Question of Fact.**

The compliance by the insured with a condition or warranty as to a watchman may be a question of fact proper to be submitted to and determined by a jury;¹ when language is not exact, as for instance "a watchman to be on the premises," it invites the question of

substantial and sufficient compliance;² and so when the warranty is that “ a suitable watch ” or “ a good watch ” will be kept, it becomes a question of fact.³

1. *Spies v. Greenwich Ins. Co.*, 97 Mich. 310, 56 N. W. Rep. 560, 23 Ins. L. J. 3; *Houghton v. Manufacturers' Ins. Co.*, 8 Metc. 114 (Mass.).

2. *Andes Ins. Co. v. Shipman*, 77 Ill. 189.

3. *Percival v. Maine Ins. Co.*, 33 Me. 242; *Parker v. Bridgeport Ins. Co.*, 10 Gray, 302 (Mass.).

For meaning of the words “ constant watch ” in connection with construction of the Maine statute, see *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 164 Mass. 291, 41 N. E. Rep. 277, 25 Ins. L. J. 36.

RULE 54.

Warranty as to Clear Space.

Insured is bound by the terms of an accepted policy warranting that a clear space of a certain number of feet should be kept between the property insured, and any building or other exposure or by any continuing warranty that there are no exposures within a certain number of feet; it is the equivalent of an agreement that there shall be no exposures within the prescribed distance, during the life of the policy, and if there is, it constitutes a breach without regard to any question of an increase of risk, or to any alleged parol agreement to contrary prior to the issue and acceptance of the policy, or to the fact that the insured did not read it.¹ The measurement of prescribed feet should be made from a shed attached to the main building, and not from the body of the building.²

1. *Keller v. Liverpool, L. & G. Ins. Co.*, 27 Tex. Civ. App. 102, 65 S. W. Rep. 695; *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. Rep. 752, 28 Ins. L. J. 143.

2. *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 223, 51 Pac. Rep. 174, 26 Ins. L. J. 969.

RULE 55.

Statements as to Value.

A stated value warranted to be the value goes beyond an expression of opinion and becomes an assertion of a fact, operative as a warranty;¹ and a substantial overvaluation voids the policy without regard to motive or intent.² Ordinarily an estimate of value is but a mere matter of opinion, and not a statement of fact.³ There may be distinction as to a valued policy.⁴

1. *School District v. State Ins. Co.*, 61 Mo. App. 597; *Lama v. Dwelling-House Ins. Co.*, 51 Mo. App. 447; *Bobbitt v. Liverpool, L. & G. Ins. Co.*, 66 N. C. 70; *American Ins. Co. v. Gilbert*, 27 Mich. 429.

2. *Sheldon v. Michigan Millers' Ins. Co.*, 124 Mich. 303, 82 N. W. Rep. 1068. But compare *First Nat. Bank v. Hartford Ins. Co.*, 5 Otto, 673, 95 U. S. , 7 Ins. L. J. 208; *Smith v. Home Ins. Co.*, 47 Hun, 30; *German Ins. Co. v. Read*, 13 S. W. Rep. 1080 (Ky.).

3. *Merchants' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Home Ins. Co. v. Overturf*, Ind. App. , 74 N. E. Rep. 47; *Phoenix Ins. Co. v. Wilson*, Ind. , 25 N. E. Rep. 592, 20 Ins. L. J. 73; *Pickle v. Phoenix Ins. Co.*, 119 Ind. 291, 21 N. E. Rep. 898; *Wheaton v. North B. & M. Ins. Co.*, 76 Cal. 415, 18 Pac. Rep. 758; *Cox v. Aetna Ins. Co.*, 29 Ind. 586; *Bonham v. Iowa Cent. Ins. Co.*, 25 Iowa, 328.

4. *Cox v. Aetna Ins. Co.*, *supra*; *Schmidt v. Mutual Ins. Co.*, 55 Mich. 432, 14 Ins. L. J. 207.

RULE 56.

Incendiary Fire — Other Insurance.

If, in answer to a specific question, the insured states there is no danger of an incendiary fire, and does not state the truth, as he has reason with ordinary caution and prudence to believe it, there is a breach;¹ a false statement as to other insurance will constitute a breach of warranty;² but statement that

the insurance is on the *property* does not constitute a warranty that it is upon the interest of the insured.³

1. *McBride v. Republic Ins. Co.*, 30 Wis. 562. And see *North American Ins. Co. v. Throop*, 22 Mich. 146; *Campbell v. Victoria Ins. Co.*, 45 Up. Can. Q. B. 412; *Herbert v. Mercantile Ins. Co.*, 43 Up. Can. Q. B. 384; *Greet v. Citizens' Ins. Co.*, 27 Grant Ch. 121 (Can.).

2. *Phoenix Ins. Co. v. Benton*, 87 Ind. 132, 11 Ins. L. J. 634; *Commonwealth Ins. Co. v. Huntzinger*, 98 Pa. St. 42.

3. *Planters' Ins. Co. v. Deford*, 38 Md. 382.

RULE 57.

Warranty as to Interest, Title, Lien, or Incumbrance.

When a warranty is established as to a statement of ownership or title, or existence or amount of incumbrance, lien, or mortgage, if the statement is untrue or false there is a breach rendering the policy void.¹ A renewal mortgage is not a breach of warranty against future incumbrances.² And whether there is a breach or not as to statement of amount of mortgage may be determined by the amount due thereon and not by the amount of its face or as originally written.³ When warranted the question of materiality is not open to the insured.⁴ A requirement in application that everything material to the risk is stated, is not broken by failure to disclose lien or judgment.⁵

1. *Planters' Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. Rep. 44; *Niles v. Farmers' Ins. Co.*, 119 Mich. 252, 77 N. W. Rep. 933; *Cerys v. State Ins. Co.*, 71 Minn. 338, 73 N. W. Rep. 849, 27 Ins. L. J. 258; *Barnard v. Faber*, L. R. 1 Q. B. 340 (1893); *Lama v. Dwelling-House Ins. Co.*, 51 Mo. App. 447; *Best v. German Ins. Co.*, 68 Mo. App. 598; *Denver Ins. Co. v. Resor*, 95 Ill. App. 197; *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St.

151; *Blooming Grove Ins. Co. v. McAnerney*, 102 Pa. St. 335; *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47; *Stevens v. Queen Ins. Co.*, 81 Wis. 335, 51 N. W. Rep. 555, 21 Ins. L. J. 443; *Friesmuth v. Agawam Ins. Co.*, 10 Cush. 588 (Mass.); *Brown v. People's Ins. Co.*, 11 Cush. 280; *Loehner v. Home Ins. Co.*, 17 Mo. 247; *Battles v. York County Ins. Co.*, 41 Me. 208; *Gould v. York County Ins. Co.*, 47 Me. 403; *Smith v. Empire Ins. Co.*, 25 Barb. 497; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. 84; *Patten v. Merchants' Ins. Co.*, 38 N. H. 338; *Hutchins v. Cleveland Ins. Co.*, 11 Ohio St. 477; *Abbott v. Shawmut Ins. Co.*, 3 Allen, 213 (Mass.); *Jacobs v. Eagle Ins. Co.*, 7 Allen, 132 (Mass.); *Hinman v. Hartford Ins. Co.*, 36 Wis. 159; *Schumitsch v. American Ins. Co.*, 48 Wis. 26; *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Byers v. Insurance Co.*, 35 Ohio St. 606; *Connecticut Ins. Co. v. Pyle*, 44 Ohio St. 19; *State Ins. Co. v. Jordan*, 24 Nebr. 358, 38 N. W. Rep. 839; *Glade v. Germania Ins. Co.*, 56 Iowa, 400; *Crook v. Phenix Ins. Co.*, 38 Mo. App. 582; *Pierce v. Empire Ins. Co.*, 62 Barb. 636; *Cuthbertson v. North Carolina Ins. Co.*, 96 N. C. 480; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202; *Birmingham v. Empire Ins. Co.*, 42 Barb. 457.

2. *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. Rep. 319.

3. *Dougherty v. German-American Ins. Co.*, 67 Mo. App. 526; *Hosford v. Germania Ins. Co.*, 127 U. S. 399. And see *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Mutual Millers' Ins. Co. v. Gordon*, 20 Ill. App. 560, aff'd, 12 Ill. 366.

4. *Cerys v. State Ins. Co.*, 71 Minn. 338, 73 N. W. 849, 27 Ins. L. J. 258.

5. *City Ins. Co. v. Carrugi*, 41 Ga. 660.

RULE 58.

Construction of Various Warranties as to Interest or Title.

Description or statement "his property," does not constitute a warranty as to title;¹ unless in reply to specific inquiry in application made part of the policy, it may be effective as a warranty;² an omission to disclose an existing executory contract to convey is not a breach of condition that an application contains a just, full, and true exposition of all facts in regard to situation, value, and risk of the property;³ an equitable

title or interest in vendee in possession under an executory contract of sale, may satisfy representations as to his ownership and interest in absence of specific inquiry or exact and unambiguous assertions or statements;⁴ but this does not prevent violation of specific conditions in policy as to title or interest;⁵ a statement of "fee-simple" is not rendered untrue by existence of wife's contingent right of dower;⁶ so when question as to title is answered "deed," it does not mean an unqualified grant in fee of a freehold estate, any other interest founded on a deed would not make the statement untrue;⁷ a statement that insured "owns" the property is not rendered false by existence of a mortgage;⁸ when warranty is by joint owners insured that there is no incumbrance, a mortgage by one on his interest constitutes a breach;⁹ the effect of a deed may be qualified by another writing executed at same time.¹⁰

1. *Mutual Ins. Co. v. Deale*, 18 Md. 26; *Dohn v. Farmers' Ins. Co.*, 5 Lans. 275 (N. Y.).

2. *McCormick v. Springfield F. & M. Ins. Co.*, 66 Cal. 361, 24 Pac. Rep. 1005, 14 Ins. L. J. 373; *Dohn v. Farmers' Ins. Co.*, 5 Lans. 275 (N. Y.).

3. *Davis v. Quincy Ins. Co.*, 10 Allen, 113 (Mass.).

4. *Lorillard Ins. Co. v. McCulloch*, 21 Ohio St. 176; *McCulloch v. Norwood*, 58 N. Y. 562; *Franklin Ins. Co. v. Martin*, 11 Vroom, 568 (N. J.); *Rumsey v. Phoenix Ins. Co.*, 17 Blatchf. 527 (U. S. Cir.).

5. *Franklin Ins. Co. v. Martin*, *supra*.

6. *Southern Ins. Co. v. Kloeber*, 31 Gratt. 739 (Va.).

7. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452. And see *Dacy v. Agricultural Ins. Co.*, 21 Hun, 83; *Pavey v. American Ins. Co.*, 56 Wis. 221.

8. *Carson v. Jersey City Ins. Co.*, 14 Vroom, 300 (N. J.).

9. *Denver Town Ins. Co. v. Resor*, 95 Ill. App. 197.

10. *Farmers & Merchants' Ins. Co. v. Hahn*, Nebr., 96 N. W. Rep. 255.

RULE 59.

Construction of Other Various Warranties.

Description as “ his building ” is no warranty of ownership in absence of specific inquiry and answer as to interest or title;¹ “ will be occupied by a tenant ” is a statement of expectation and not a stipulation that it shall be so occupied;² a statement of judgment or opinion is not a representation of a fact;³ if insured gives orders to his servants to comply with a promissory warranty and they neglect to do so, it does not necessarily constitute a breach;⁴ a statement that there is no planing-mill on the premises, is not made untrue by such a machine in an adjoining building not included in policy;⁵ when question is whether all stove-pipes passed into good brick chimneys and insured replies “ one does not, but that he will build a chimney in the spring,” failure of insured to build a chimney does not relieve the company from liability;⁶ when question is as to truth of statement in application as to age of a building, the computation is from date of its erection, and not from the age of materials used in construction;⁷ description as “ brick building ” is not a warranty that the building is constructed entirely of brick;⁸ a statement that building is used for storage of ice does not amount to a warranty that ice is therein stored when policy issues;⁹ a description of several buildings adjoining and communicating situate “ detached,” does not mean detached from each other, but as a whole or mass, detached from other buildings;¹⁰ when insured warrants that he will not work in gin-

house at night or by artificial light, there is no breach in use of artificial light for a purpose other than work;¹¹ if insured states that he has no *fears* that his property is in danger from incendiarism, a breach is not established by an attempt to burn the property and consequent cancellation of another policy;¹² an upright portable engine is a steam farm engine, when used within prohibited distance from insured buildings for filling silos upon a farm.¹³

1. *Niblo v. Insurance Co. of N. A.*, 1 Sandf. 551 (N. Y.); *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47.

2. *Herrick v. Union Ins. Co.*, 48 Me. 558.

3. *Dennison v. Thomaston Ins. Co.*, 20 Me. 125.

4. *Daniels v. Hudson River Ins. Co.*, 12 Cush. 416 (Mass.); *Insurance Co. N. A. v. McDowell*, 50 Ill. 120; *Aurora Ins. Co. v. Eddy*, 55 Ill. 213.

5. *Mulville v. Adams*, 19 Fed. Rep. 887, 13 Ins. L. J. 435.

6. *Waterbury v. Dakota Ins. Co.*, 6 Dak. 468, 43 N. W. Rep. 697.

7. *Phoenix Ins. Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. Rep. 432. And see *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238.

8. *Gerhauser v. North B. & M. Ins. Co.*, 7 Nev. 174.

9. *Dolliver v. St. Joseph Ins. Co.*, 131 Mass. 39, 10 Ins. L. J. 380.

10. *Broadwater v. Lion Ins. Co.*, 34 Minn. 465, 15 Ins. L. J. 295.

11. *Mechanics' Ins. Co. v. Thompson*, 57 Ark. 279, 21 S. W. Rep. 468, 22 Ins. L. J. 383.

12. *Home Ins. Co. v. Feyerabend*, 7 Kans. App. 231, 52 Pac. Rep. 899.

13. *Wilson v. Union Mutual Ins. Co.*, 75 Vt. 320, 55 Atl. Rep. 662.

CHAPTER FOURTH.

Other Insurance.

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RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

In Michigan the standard form is the same as above except that there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.”

By the standard form of policy prescribed in:

Maine,

Massachusetts,

it is provided:

“This policy shall be void if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company.”

The standard form of policy prescribed in Minnesota provides that

“The policy shall be void if the assured now has or shall hereafter make any other insurance on the said property without the assent of the company.”

* See note to “Concealment,” Rule 1, page 2.

The standard form of policy prescribed in New Hampshire provides that:

"This policy shall be void if the insured, at the time of any loss, has any other insurance on the said property without the assent in writing or in print of the company."

The South Dakota form is same as in Minnesota, except that the word "obtain" is substituted for the word "make."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

The Michigan statute (1897) providing that no policy of fire insurance shall be declared void by the company for the breach of any condition of the policy, if the company has not been injured by such breach; or where a loss has not occurred during such breach; or by reason of such breach of condition, applies to all policies issued in that State, whether the policy is of the Michigan standard form or not.

McGannon v. Michigan Millers' Ins. Co., 127 Mich. 636, 87 N. W. Rep. 61.

The Ohio R. S., § 3643, in substance requiring an examination by company's agent of property before issue of a policy, and in the absence of change increasing the risk or fraud, making company liable for amount written in policy, has no application to the condition in regard to other insurance. If such provision is violated without consent of the company, risk is increased as matter of law, and insurance is forfeited.

Sun Fire Office v. Clark, 53 Ohio St. 414, 25 Ins. L. J. 333, 42 N. E. Rep. 248.

Nor does it have application to a condition in regard to change in title or incumbrance.

Webster v. Dwelling-House Ins. Co., 53 Ohio St. 558, 30 L. R. A. 719, 25 Ins. L. J. 488, 42 N. E. Rep. 546.

The statute relates to the physical condition of the property, such as an inspection would disclose.

Webster v. Dwelling-House Ins. Co., 53 Ohio St. 558, 30 L. R. A. 719, 25 Ins. L. J. 488, 42 N. E. Rep. 546.

Under an old Maine statute it was held that the existence of other insurance as a defense must be shown to have materially increased the risk. *Lindley v. Union Ins. Co.*, 65 Me. 368. The statute was probably superseded or repealed by the statute prescribing the standard form. And see R. S. 1903, repealing act, p. 1015.

RULE 2.

Condition as to Other Insurance Reasonable and Enforced.

Other insurance on the same property having a tendency to cause carelessness and fraud, a condition in a fire insurance policy requiring permission for the existence of other insurance, and if such permission be not given in writing that the policy shall be void, is customary and reasonable, and will be enforced by the courts.

Northern Assur. Co. *v.* Grand View Building Assoc., 183 U. S. 308, 22 Sup. Ct. Rep. 133, rev'g 101 Fed. Rep. 77, 41 C. C. A. 207; Phoenix Ins. Co. *v.* Gray, 107 Ga. 110, 32 S. E. Rep. 948; Arnold *v.* Insurance Co., 106 Tenn. 529, 61 S. W. Rep. 1032; McSparran *v.* Southern Ins. Co., 193 Pa. St. 184, 44 Atl. Rep. 317; Young *v.* St. Paul F. & M. Ins. Co., 68 S. C. 387, 47 S. E. Rep. 681; Orient Ins. Co. *v.* Prather, 25 Tex. Civ. App. 446, 62 S. W. Rep. 89; Home Ins. Co. *v.* Overturf, Ind. App. , 74 N. E. Rep. 47; Bowlus *v.* Phoenix Ins. Co., Ind. , 32 N. E. Rep. 319; Planters' Mut. Ins. Assoc. *v.* Green, Ark. , 80 S. W. Rep. 151; Sanders *v.* Cooper, 115 N. Y. 279; Bigler *v.* New York Central Ins. Co., 22 N. Y. 402; Johnson *v.* American Ins. Co., 41 Minn. 396, 43 N. W. Rep. 59; Barnard *v.* National Ins. Co., 27 Mo. App. 26; Queen Ins. Co. *v.* Young, 86 Ala. 424, 5 So. Rep. 116; Heyl *v.* Ætna Ins. Co., Ala. , 38 So. Rep. 118; Halliday *v.* St. Paul F. & M. Ins. Co., 31 Ill. App. 398; Phoenix Ins. Co. *v.* Michigan Southern R. Co., 28 Ohio St. 69. And see Harris *v.* Ohio Ins. Co., 5 Ohio, 467; Insurance Co. *v.* Slockbower, 26 Pa. St. 199; Kimball *v.* Howard Ins. Co., 8 Gray, 33 (Mass.); David *v.* Hartford Ins. Co., 13 Iowa, 69; Gilbert *v.* Phoenix Ins. Co., 36 Barb. 372; Deitz *v.* Mound City Ins. Co., 38 Mo. 85; Manhattan Ins. Co. *v.* Stein, 5 Bush, 652 (Ky.); Duclos *v.* Citizens' Ins. Co., 23 La. Ann. 332; Walton *v.* Louisiana Ins. Co., 2 Rob. 563 (La.); Phoenix Ins. Co. *v.* Benton, 87 Ind. 132, 11 Ins. L. J. 634.

RULE 3.

What Constitutes Double Insurance.

To constitute double insurance the insured must have or make two or more insurances, either simul-

taneous or successive, on the same subject, same risk, and the same interest.

West Branch Lumbermen's Exchange v. American Ins. Co., 183 Pa. St. 366, 27 Ins. L. J. 305, 38 Atl. Rep. 1081; *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14; *Copeland v. Phoenix Ins. Co.*, 11 So. Rep. 746, 22 Ins. L. J. 224; *Haire v. Ohio Farmers' Ins. Co.*, 93 Mich. 481, 53 N. W. Rep. 623, 22 Ins. L. J. 66; *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1, 10 Ins. L. J. 354; *Roos v. Merchants' Ins. Co.*, 27 La. Ann. 409; *Roots v. Cincinnati Ins. Co.*, 1 Disn. 138 (Ohio); *Planters' Ins. Co. v. Rowland*, 66 Md. 236, 16 Ins. L. J. 345. And see *Tyler v. Ætna Ins. Co.*, 12 Wend. 507, aff'd, 16 Wend. 385; *Jones v. Maine Ins. Co.*, 18 Me. 155; *State Ins. Co. v. New Hampshire Trust Co.*, 47 Nebr. 62, 66 N. W. Rep. 9, rehearing denied, 47 Nebr. 71, 66 N. W. Rep. 1106.

RULE 4.

Joint and Several Interests.

When a policy covers the joint interest of several owners or tenants in common, the having or procuring of a policy by one of them upon his interest in the same subject or property constitutes other insurance,¹ but otherwise when former policy does not cover or include his interest.² And so when policy is issued on an individual undivided interest, a subsequent policy upon another individual interest is not other insurance.³

1. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Horridge v. Dwelling-House Ins. Co.*, 75 Iowa, 374, 39 N. W. Rep. 648; *Gillett v. Liverpool, L. & G. Ins. Co.*, 73 Wis. 203, 41 N. W. Rep. 78.

2. *Franklin Ins. Co. v. Drake*, 2 B. Mon. 47 (Ky.).

3. *Hall v. Concordia Ins. Co.*, 90 Mich. 403, 51 N. W. Rep. 524, 21 Ins. L. J. 724.

RULE 5.

Effect of Violation of Condition — Estoppel — Voidable.

The policy becomes void by its terms on procuring by the insured of the other insurance, and is not merely suspended; it cannot thereafter be revived without the consent of the insurer, after knowledge of the fact;¹ or by facts operating as an estoppel² it is not absolutely void, but voidable at the company's election.³

1. *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. Rep. 358, 37 C. C. A. 96; *Johnson v. American Ins. Co.*, 41 Minn. 396, 43 N. W. Rep. 59.

2. *New York Central Ins. Co. v. Watson*, 23 Mich. 486. *Contra*, *New England Ins. Co. v. Schettler*, 38 Ill. 166, where it was held that if the other insurance was only temporary and had ceased to exist at time of the loss, it did not affect the right to recover. And so where it had expired or had been canceled prior to the loss. *Germania Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. Rep. 489, 19 Ins. L. J. 126. And see *New Orleans Ins. Assoc. v. Holberg*, 64 Miss. 51.

3. *Farmers' Ins. Co. v. Home Ins. Co.*, 54 Nebr. 740, 74 N. W. Rep. 1101; *Slobodisky v. Phenix Ins. Co.*, 52 Nebr. 395, 72 N. W. Rep. 483, 27 Ins. L. J. 53; *German Ins. Co. v. Emporia Loan Assoc.*, 9 Kans. App. 803, 59 Pac. Rep. 1092; *Baer v. Phoenix Ins. Co.*, 4 Bush, 242 (Ky.). And see *Bigler v. New York Central Ins. Co.*, 22 N. Y. 402.

And see Vol. 1, *Fire Insurance as Valid Contract*, "Construction and Waiver."

RULE 6.

Construction of the Word "Insured."

The word "insured" is strictly construed, and is limited in its application to the person actually occupying the position of the insured at the time the policy issues, or at the time the other insurance is taken. If the party taking or obtaining the other policy does not occupy such relation as the insured, or if his interest

is different, there is no such other insurance as will void the former policy.

De Witt v. Agricultural Ins. Co., 89 Hun, 229, 36 N. Y. Supp. 570, aff'd, 157 N. Y. 353, 51 N. E. Rep. 977. And see *Ætna Ins. Co. v. Tyler*, 12 Wend. 507, aff'd, 16 Wend. 305 (N. Y.).

RULE 7.

Insurance Resulting from Operation of Law Without Design — Evidence — Parol Contracts — Unaccepted or Rejected Policy.

Other insurance resulting from operation of law, and without design upon the part of the insured, is not a violation of the true spirit and intent of the condition, and there being no imputation of fraud, it may be shown by facts and circumstances outside of the policy that it was not the intention of insured to obtain other or double insurance.¹ And so an attempt to obtain other insurance never completed or effected, or an insufficient parol contract of insurance, is not other insurance;² but evidence that the insured thought there was no other insurance is not admissible,³ nor can an officer of the company be asked a hypothetical question as to whether he would have consented to additional insurance.⁴ An unaccepted or rejected policy does not constitute additional or other insurance;⁵ but acceptance of a policy makes it additional or other insurance, without regard to original intent.⁶

1. *Mead v. American Ins. Co.*, 13 App. Div. 476, 43 N. Y. Supp. 334. And see *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353; *Dwelling-House Ins. Co. v. Garner*, 56 Ill. App. 199; *Phoenix Ins. Co. v. Boulden*, 96 Ala. 609, 11 So. Rep. 774, 22 Ins. L. J. 176.

2. *Sutherland v. Old Dominion Ins. Co.*, 31 Gratt. 176 (Va.). And see *Wilson v. Queen Ins. Co.*, 5 Fed. Rep. 674, 10 Ins.

L. J. 302; *Taylor v. State Ins. Co.*, 107 Iowa, 275, 77 N. W. Rep. 1032.

3. *Zinck v. Phoenix Ins. Co.*, 60 Iowa, 266; *Perry v. Liverpool, L. & G. Ins. Co.*, 34 N. B. 380.

4. *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256.

5. *Price v. Home Ins. Co.*, 54 Mo. App. 119; *Phoenix Ins. Co. v. Hague*, 34 S. W. Rep. 654 (Tex. Civ. App.).

6. *Cutler v. Royal Ins. Co.*, 70 Conn. 566, 40 Atl. Rep. 529, 41 L. R. A. 159.

RULE 8.

Delivery of Policy upon Condition — As Affected by Cancellation.

When the policy is executed and delivered upon the express condition that a prior one in another company should be surrendered and canceled, such prior policy is not other insurance requiring written consent though not canceled until some time subsequently;¹ and so when a policy is surrendered to a local agent with mutual intent to cancel same, and the agent is directed to obtain another policy in place of it, which he does, in suit upon the latter policy the former is not considered as other insurance,² and so when prior insurance is canceled or lapses before issue of a subsequent policy, it is not other insurance making latter void.³

1. *Atlantic Ins. Co. v. Goodall*, 9 Fost. 182 (N. H.); *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Knowles v. American Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50, aff'd, on opinion below, 142 N. Y. 641.

2. *Train v. Holland Purchase Ins. Co.*, 68 N. Y. 208.

3. *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. Rep. 453.

RULE 9.

Effect of Noncompliance With Statute.

A policy cannot be claimed to be inoperative as other insurance because the company issuing it has not com-

plied with a statute governing its admission to the State and authority to transact business.

Behler v. German Ins. Co., 68 Ind. 347.

RULE 10.

Motive of Insured Immaterial.

If additional insurance without permission is relied upon as a defense to a claim on the prior policy, the motive or intention of the party or insured in obtaining it is immaterial.

Pennsylvania Ins. Co. v. Kittle, 39 Mich. 51.

RULE 11.

Other Insurance Effected at Same Time.

Other insurance effected at the same time is within the operative force of the language "if the insured now has, or shall hereafter make or procure any other contract of insurance."

United Firemen's Ins. Co. v. Thomas, 92 Fed. Rep. 127, 34 C. C. A. 240, 28 Ins. L. J. 500, aff'g on rehearing 82 Fed. Rep. 406, 27 C. C. A. 42.

RULE 12.

Effect of Binder or Certificate of Temporary Insurance.

When the insured holds a binder or certificate, or temporary written agreement for insurance, it is not necessary that consent to other insurance should be indorsed thereon,¹ but condition requiring such written consent becomes operative upon delivery and accept-

ance of the policy.² And even in former case the conditions of the policy are otherwise legally operative.³

1. *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371, 10 Ins. L. J. 657. And see *Cockburn v. British Amer. Assur. Co.*, 19 Ont. 245 (Can.).

2. *Diver v. London & Lancashire Ins. Co.*, 9 N. Y. St. Rep. 482, 17 Ins. L. J. 156.

3. *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594. And see title, "Oral or Parol Contracts."

RULE 13.

Effect of Insufficient Parol Contract of Insurance.

An insufficient parol contract of insurance is not converted into other insurance voiding existing policies, by issue and delivery of a policy after a fire;¹ the fact that the insured makes claim under such policy and secures a compromise thereon does not estop him from denying its existence as other insurance when that defense is set up in an action on a prior policy.²

1. *Taylor v. State Ins. Co.*, 107 Iowa, 275, 77 N. W. Rep. 1032.

2. *Taylor v. State Ins. Co.*, *supra*. And see *Commercial Assur. Co. v. Temple*, 29 Can. S. C. 206, 210. And see this volume, title "Parol Contracts."

RULE 14.

Insurance in Excess of Permitted Amount.

Where policy permits a certain amount of additional insurance and assured procures or has insurance in excess of such amount it voids the policy.

Allen v. German-American Ins. Co., 123 N. Y. 6, 25 N. E. Rep. 309, 19 Ins. L. J. 979; *Mussey v. Atlas Ins. Co.*, 14 N. Y. 79; *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389, *aff'g* 1 Daly, 8; *Commercial Union Assur. Co. v. Norwood*, 57 Kans. 610, 47

Pac. Rep. 529, 26 Ins. L. J. 177; *East Texas Ins. Co. v. Flippen*, 4 Tex. Civ. App. 576, 23 S. W. Rep. 550, 23 Ins. L. J. 219; *Works & Pritchett v. Springfield F. & M. Ins. Co.*, Tex. Civ. App. , 79 S. W. Rep. 42; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229. And see *Simpson v. Pennsylvania Ins. Co.*, 38 Pa. St. 250.

Merely substituting one company for another, without exceeding the limit of insurance permitted, is not the procuring of other insurance as to void the policy.

Parsons v. Standard Ins. Co., 5 Duval, 233 (Can. Sup.). And see Rule 19 *et seq.*

When the excessive insurance is obtained through mistake of the agent in calculating the total amount of insurance, it does not vitiate older insurance otherwise legal and binding.

Boulden v. Phoenix Ins. Co., 96 Ala. 609, 11 So. Rep. 774, 22 Ins. L. J. 176.

RULE 15.

Effect of Blank Permission for Other Insurance.

When there is inserted in the policy "total insurance permitted, \$.....," the blank not being filled in, such clause does not conflict with the condition of the policy as to other insurance, but is in perfect accord with it. In the absence of any sum being named in the blank it does not import the consent of the company to additional insurance, but the very contrary.

Labell v. Georgia Home Ins. Co., 28 S. W. Rep. 133, Tex. Civ. App. .

RULE 16.

Interest of Mortgagor and Mortgagee.

An insurance obtained by a mortgagee upon his own interest or for his exclusive benefit is not other insurance within the operation of a condition against other insurance in a policy held and obtained by the owner or mortgagor upon his interest;¹ so where the mortgagee intended to insure his interest exclusively, but

policy in form was issued in name of mortgagor with loss payable to the mortgagee, a subsequent policy obtained by the mortgagor upon his interest is not other insurance;² and so where mortgagee, without knowledge or consent of the owner, obtains policy in same form, a prior policy obtained by the owner upon his interest is not other insurance.³ But when policy is procured by the owner and assigned by him to the mortgagee or loss made payable to latter, another policy procured by the owner is other insurance,⁴ but not when it is procured by the wife of the owner as his devisee and executrix.⁵

1. *Guest v. New Hampshire Ins. Co.*, 66 Mich. 98, 33 N. W. Rep. 31; *Jackson v. Massachusetts Ins. Co.*, 23 Pick. 418 (Mass.); *Holbrook v. American Ins. Co.*, 1 Curt. 193 (U. S. Cir.); *Rowley v. Empire Ins. Co.*, 36 N. Y. 550, 3 Keyes, 557; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518.

2. *Woodbury Savings Bank v. Charter Oak Ins. Co.*, *supra*. And see *Carpenter v. Continental Ins. Co.*, 61 Mich. 635, 28 N. W. Rep. 749, 15 Ins. L. J. 667.

3. *Westchester Ins. Co. v. Foster*, 90 Ill. 121. And see *Continental Ins. Co. v. Hulman*, 92 Ill. 145.

4. *Kempf v. Farmers' Ins. Co.*, 41 Mo. App. 27; *State Ins. Co. v. Roberts*, 31 Pa. St. 438; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Guinn v. Phoenix Ins. Co.*, 31 S. W. Rep. 566 (Tex. Civ. App.).

See Vol. 1, *Fire Insurance as Valid Contract*, "Mortgagor and Mortgagee."

5. *Burke v. Niagara Ins. Co.*, 12 N. Y. Supp. 254.

RULE 17.

Insurance of Vendee's Interest.

An indorsement obtained by a mortgagee to whom loss payable, upon a policy issued to the vendor recognizing a vendee under an executory contract of sale as

owner of the policy and property, and without the knowledge or authority of such vendee, does not make the policy void, on account of other insurance obtained by such vendee upon his interest.

De Witt v. Agricultural Ins. Co., 157 N. Y. 353.

RULE 18.

**Other Insurance Must be by Consent or Authority of Insured
— Act of Mortgagee.**

Insurance procured by a mortgagee without the knowledge, consent, or authority of the owner, covering the owner's interest, is not other insurance avoiding another policy obtained by the owner;¹ the usual clause in the mortgage authorizing the mortgagee to procure insurance in case of the owner's default, to keep property insured, is inoperative until the owner is actually shown to have been in default after notice or demand;² there is no ratification by the owner after a loss in making claim under a policy thus procured by the mortgagee without authority, so as to make the procuring of the policy his act;³ nor does mere notice by the mortgagee to the owner before a loss that he had taken out insurance without information as to whether it covered the owner's interest or the mortgagee's interest constitute sufficient evidence of ratification.⁴ But such insurance so obtained, while not making policy void, may require apportionment of the loss.⁵ As between the mortgagor and mortgagee it is presumed, in absence of any communication of a contrary intent, that insurance taken out by the mortgagee

is in pursuance of authority contained in the mortgage.⁶

1. *Church of St. George v. Sun Fire Office*, 54 Minn. 162, 55 N. W. Rep. 909; *Niagara Ins. Co. v. Scammon*, 144 Ill. 490, 28 N. E. Rep. 919, 21 Ins. L. J. 592; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Doran v. Franklin Ins. Co.*, 86 N. Y. 635, 10 Ins. L. J. 842. And see *Cannon v. Home Ins. Co.*, 49 La. Ann. 1367, 22 So. Rep. 387, 26 Ins. L. J. 737; *De Witt v. Agricultural Ins. Co.*, 157 N. Y. 353; *Westchester Ins. Co. v. Foster*, 90 Ill. 121; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Sauvey v. Isolated Ins. Co.*, 44 Up. Can. Q. B. 523.

2. *Titus v. Glens Falls Ins. Co.*, *supra*; *Doran v. Franklin Ins. Co.*, *supra*; *Cannon v. Home Ins. Co.*, *supra*.

3. *Titus v. Glens Falls Ins. Co.*, *supra*; *Doran v. Franklin Ins. Co.*, *supra*.

4. *Church of St. George v. Sun Fire Office*, 54 Minn. 162, 55 N. W. Rep. 909.

5. *Doran v. Franklin Ins. Co.*, *supra*.

6. *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. Rep. 736, 26 Ins. L. J. 183.

RULE 19.

Cancellation and Substitution Without Authority — Election — Waiver or Estoppel.

When an agent without authority from the insured assumes or attempts to cancel one policy and substitute that of another company, and the insured elects to bring suit on the latter policy, such election does not operate as a ratification of the unauthorized act of the agent in canceling the prior policy and its existence as other insurance is a good and sufficient defense, there being no claim or issue as to waiver or estoppel;¹ but may be otherwise when there is claim of waiver or estoppel by notice to or knowledge of the agent as to existence of such other insurance.²

1. *Johnson v. North B. & M. Ins. Co.*, 66 Ohio St. 6, 63 N. E. Rep. 610.

2. *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624, 68 S. W. Rep. 653.

See this volume, "Cancellation," and Volume 1, Fire Insurance as a Valid Contract, "Waiver."

RULE 20.

Substitution Without Authority.

When an agent, without authority from the assured, marks one policy canceled, and substitutes another policy, but before delivery of the latter the fire occurs, the assured having no knowledge, the first policy remains in force and the second one never takes effect; nor does it take effect by delivery to the assured after the fire.

Kerr v. Milwaukee Mechanics' Ins. Co., 117 Fed. Rep. 442, 54 C. C. A. 616.

And that assured is not bound to give notice of the existence of other insurance of which he has not and cannot have any knowledge, see *Commercial Union Assur. Co. v. Temple*, 29 Can. S. C. 206.

RULE 21.

Attempted Ineffective Cancellation and Substitution.

An attempted but ineffective cancellation of policy by substitution of policy of another company voids policy of latter on account of existence of prior insurance.

Hartford Ins. Co. v. McKenzie, 70 Ill. App. 615.

RULE 22.

Policy Never Delivered or Accepted as Substitute.

A policy which is never delivered or accepted as a substitute for a prior policy and legally inoperative

as a contract cannot be claimed to be other insurance, making the prior policy void.

Milwaukee Mechanics' Ins. Co. v. Graham, 181 Ill. 158, 54 N. E. Rep. 914.

RULE 23.

Insured Bound by His Own Act in Obtaining Other Insurance.

When insured has directed his agent or broker to procure insurance, and then, without hearing from him or taking any steps to learn, himself obtains a policy, in an action upon a prior policy obtained by his broker or agent, the obtaining of the second policy by the insured renders void the policy obtained by the agent or broker.

Arnold v. Insurance Co., 106 Tenn. 529, 61 S. W. Rep. 1032.

RULE 24.

Insured Must be Consistent in Repudiation — Ratification of Unauthorized Act.

If there is another policy or other insurance claimed by the insured to have been obtained without his knowledge, authority, or consent, he must be and remain consistent in repudiation of the same; if he ratifies the unauthorized act in procuring the insurance by making claim therefor and receiving payment, he cannot deny its existence as "other" insurance within meaning of the condition;¹ but acceptance or ratification cannot be predicated upon the mere facts that repudiation of the unauthorized act was not immediate, and that after the fire insured sent to the company a proof of loss, but coupled with the statement that the

policy was procured without his knowledge or consent, and the company making no payment thereon.²

1. *German Ins. Co. v. Emporia Loan Assoc.*, 9 Kans. App. 803, 59 Pac. Rep. 1092; *Hughes v. Insurance Co. N. A.*, 40 Nebr. 626, 59 N. W. Rep. 112, 23 Ins. L. J. 721; *McKelvy v. German-American Ins. Co.*, 161 Pa. St. 279, 28 Atl. Rep. 1115, 23 Ins. L. J. 628. And see *Bigler v. New York Central Ins. Co.*, 22 N. Y. 402.

2. *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. Rep. 38, 26 Ins. L. J. 913; *Folb v. Phoenix Ins. Co.*, 109 N. C. 568, 13 S. E. Rep. 798.

RULE 25.

Effect of Permission for Other Concurrent Insurance — Distinction Between a Requirement and Permission — Representation — Warranty.

When permission is given in terms for "other concurrent insurance," by concurrent insurance is meant that which to any extent insures the same interest, against the same casualty, at the same time as the primary insurance, on such terms that the insurers would bear proportionally the loss happening within the provisions of both policies. It is this last quality of sharing proportionally in the loss that distinguishes concurrent insurance from mere double insurance. The permission of concurrent insurance in contrast with a requirement thereof gives the insured an option as to the time when he will procure other insurance, the length of its duration, and the property it shall cover, provided it shall proportionally aid the primary insurer in bearing whatever loss may occur within the range of their common operation. If other insurance is of this nature, it comes within the express permission. A contention that permission of "concurrent

insurance " is applicable only in case the other insurance covers all the items of defendant's policy is so narrow as not to be sustained by the courts. There is a distinction between a *requirement* and a *permission* of concurrent insurance. When the insurance company in terms requires by representation of the insured or by specific condition concurrent and proportionate insurance, in the construction of such *requirement*, concurrent means, where there is no qualifying provision, insurance running with the primary insurance for all the time and over all the objects covered by the latter.¹ A statement or representation as to amount of existing insurance does not require the insured to keep the property insured at the amount stated,² but a representation as to amount of existing insurance may be so material that a verdict to contrary should not be sustained,³ and if made a warranty a false statement constitutes a breach.⁴

1. *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 64 N. J. L. 52, 580, 46 Atl. Rep. 777.

2. *Hoffman v. Manufacturers' Ins. Co.*, 38 Fed. Rep. 487. And see Vol. 1, *Fire Insurance as Valid Contract*, "Apportionment of the Loss," Rule 10.

3. *Armour v. Transatlantic Ins. Co.*, 90 N. Y. 450, 12 Ins. L. J. 345.

4. *Phoenix Ins. Co. v. Benton*, 87 Ind. 132, 11 Ins. L. J. 634; *Commonwealth Ins. Co. v. Huntzinger*, 98 Pa. St. 42.

In *Burge v. Greenwich Ins. Co.*, 106 Mo. App. 244, 80 S. W. Rep. 342, it was held, in construing an alleged violation of permission for concurrent insurance on stock of merchandise not exceeding three-fourths of the cash value, that the Missouri R. S., § 7979 (see statutory provision, Vol. 1) precluded the company from denying value when policy was written, but did not prevent it from showing a reduction in value prior to the fire, and that the value of a stock of goods or the like is limited or governed by value at time of the fire.

RULE 26.

Construction of the Word "Concurrent."

When the policy in terms provides "other *concurrent* insurance permitted," the word "concurrent" is subject to construction and must be construed most strongly against a defendant insurance company; and in the absence of any limitation in amount, should not be construed to require later policies to exactly concur in covering all of the property. The insurance company cannot claim that to be "concurrent" the insurance must cover the identical property and no other; insurance may cover only a part of the property and still be within the terms of the permission;¹ but when the permission is for a certain amount of concurrent insurance it may be violated by obtaining insurance on a part only of the property.²

1. *Washington-Halligan Coffee Co. v. Merchants' Ins. Co.*, 110 Iowa, 423, 81 N. W. Rep. 707; *Gough v. Davis*, 24 Misc. 245, 52 N. Y. Supp. 947, aff'd, 39 App. Div. 639, without opinion; *Gough v. Selva*, 24 Misc. 763; *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235. And see *Palatine Ins. Co. v. Ewing*, 92 Fed. Rep. 111, 34 C. C. A. 236.

2. *Union Nat. Bank v. German Ins. Co.*, 71 Fed. Rep. 473, 18 C. C. A. 203, 25 Ins. L. J. 539.

RULE 27.

Meaning of the Word "Concurrent."

The word "concurrent" means acting in conjunction, agreeing in the same act, contributing to the same event or effect, co-operating, existing, or happening at the same time, operating on the same objects.

L'Engle v. Scottish Union & Nat. Ins. Co., Fla. ,
37 So. Rep. 462.

RULE 28.

Construction of Permission for Concurrent Insurance.

A permission for a certain amount "total concurrent insurance" is construed as meaning that there must be a concurrence of the total insurance upon the subjects of the insurance, that is, the total insurance must operate at the same time and upon the same property. Such permission is not construed as allowing additional insurance in excess of the limited or prescribed amount on a part of the same subject.

Senor & Munz v. Western Millers' Ins. Co., 181 Mo. 104, 79 S. W. Rep. 687.

RULE 29.

Same Subject — When Permits Other Insurance.

When a policy for certain amount, as, for instance, \$2,500, contains a clause "\$2,500 total concurrent insurance permitted," it permits other concurrent insurance not to exceed \$2,500. The term "concurrent insurance," used in granting the permission for insurance, cannot be construed as embracing the one in which the permission is granted, but necessarily embraces another amount or another policy, though it may, under some circumstances, include the former; otherwise there would be an amount or a policy concurrent with itself alone, which is an impossibility under any definition of the word.

L'Engle v. Scottish Union & Nat. Ins. Co., Fla. , 37 So. 462.

RULE 30.

Same Subject — Amount Left Blank.

An indorsement or clause reading “\$. other concurrent insurance permitted,” the amount being left blank, may be construed as permitting additional insurance.

Medley v. German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. Rep. 101.

RULE 31.

Same Subject — Amount Left Blank — Additional Insurance not Permitted.

A permission for “\$. total concurrent insurance,” the amount being left blank, does not permit additional or other insurance.

Philadelphia Underwriters' Ins. Co. v. Bigelow, Fla. , 37 So. Rep. 210.

RULE 32.

Effect of Difference in Form.

A permission for “other insurance concurrent in form herewith” with loss payable to a third party or mortgagee, is not violated by another policy insuring same property in same form, but omitting the clause making the loss payable to the mortgagee.

Caraher v. Royal Ins. Co., 63 Hun, 82, 17 N. Y. Supp. 858, aff'd, 136 N. Y. 645, on opinion below.

RULE 33.

Effect of a Coinsurance Clause as Consent to Other Insurance.

A coinsurance clause in terms requiring the maintenance by the insured of insurance up to within a certain prescribed limit or percentage of value of the

property operates as a consent to such total insurance;¹ but not to more than the prescribed limit.²

1. *Dolan v. Missouri Town Ins. Co.*, 88 Mo. App. 666; *Pool v. Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530, 65 N. W. Rep. 54. And see *Bush v. Missouri Ins. Co.*, 85 Mo. App. 155; *Catoosa Springs Co. v. Linch*, 18 Misc. 209, 41 N. Y. Supp. 377, citing *Pool v. Milwaukee Mechanics' Ins. Co.*, *supra*; *Strauss v. Phoenix Ins. Co.*, 9 Colo. App. 386, 48 Pac. Rep. 822, 26 Ins. L. J. 676.

It should be noted that there is difference in the language of the various coinsurance clauses. The preceding cases in the appellate courts were decided upon construction of clauses which in *terms required* the insured to maintain the insurance. This specific provision or requirement is omitted from later clauses which in substance leaves it entirely optional with the insured whether he maintains the insurance or not, and merely stating the effect if he does not.

2. *Cutler v. Royal Ins. Co.*, 70 Conn. 566, 40 Atl. Rep. 529; *Nestler v. Germania Ins. Co.*, 44 Misc. 97, 89 N. Y. Supp. 782. And see Rule 14.

RULE 34.

As Between a First and Second Policy.

As between a first and second policy, both containing the clause against other insurance, the first continues valid and enforceable, and the second is void; being void it creates no other insurance and therefore does not impair the validity of the first policy.

Sweeting v. Mutual Ins. Co., 83 Md. 63, 32 L. R. A. 570, 25 Ins. L. J. 730, 34 Atl. Rep. 826 (there is a valuable and interesting discussion of the question by the chief justice in this case); *Gee v. Insurance Co.*, 55 N. H. 65, where it was so held notwithstanding that both policies contained the words "whether valid or not;" *Firemen's Ins. Co. v. Holt*, 35 Ohio St. 189, 9 Ins. L. J. 212; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291; *Bigelow v. Granite State Ins. Co.*, 94 Me. 39, 46 Atl. Rep. 808. And see *Gale v. Belknap County Ins. Co.*, 41 N. H. 170; *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325; *Thomas v. Builders' Ins. Co.*, 119 Mass. 121; *Keyser v. Hartford Ins. Co.*,

66 Mich. 664, 33 N. W. Rep. 756; *Halliday v. St. Paul F. & M. Ins. Co.*, 31 Ill. App. 398; *Robinson v. Fire Assoc.*, 63 Mich. 90, 16 Ins. L. J. 65; *Jackson v. Massachusetts Ins. Co.*, 23 Pick. 418 (Mass.), and *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456, where by similar reasoning the first policy was held void, though second might be claimed to be void on account of the prior insurance, under construction of the Georgia statute or code.

That first policy is not affected by a second or subsequent policy, if insured could not at any time recover on the second, see also *Stacey v. Franklin Ins. Co.*, 2 Watts & Serg. 506 (Pa.); *Clarke v. New England Ins. Co.*, 6 Cush. 342 (Mass.); *Hardy v. Union Ins. Co.*, 4 Allen, 217 (Mass.); *Schenck v. Mercer County Ins. Co.*, 24 N. J. L. 447; *Philbrook v. New England Ins. Co.*, 37 Me. 137.

RULE 35.

Distinction Between Void and Voidable Insurance.

If the other policy claimed to be other insurance is absolutely inoperative or void, it does not prevent a recovery on the policy under which the claim is made, but such other insurance is a good defense when voidable only at the option of the insurance company, or the invalidity of the policy not appearing on its face;¹ a policy valid on its face, to avoid which proof of extrinsic facts is necessary, if accepted by the insured, constitutes other insurance;² when policy has ceased to cover by reason of removal of the property, it is not other insurance,³ and the words "valid or not" do not prevent such result.⁴ A policy which is never delivered or accepted as a substitute for a prior policy and legally inoperative as a contract cannot be claimed to be other insurance.⁵

1. *Landers v. Watertown Ins. Co.*, 86 N. Y. 414, 10 Ins. L. J. 862; *American Ins. Co. v. Replogle*, 114 Ind. 1, 15 N. E. Rep.

810; *Mitchell v. Lycoming Ins. Co.*, 51 Pa. St. 402; *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573; *Bigler v. New York Central Ins. Co.*, 22 N. Y. 402, citing and following *Carpenter v. Providence-Washington Ins. Co.*, 16 Pet. 495 (U. S.), and distinguishing the earlier cases of *Jackson v. Massachusetts Ins. Co.*, 23 Pick. 418; *Stacey v. Franklin Ins. Co.*, 2 Watts & Serg. 514 (Pa.); *Clark v. New England Ins. Co.*, 6 Cush. 342 (Mass.), and *Philbrook v. New England Ins. Co.*, 37 Me. 137. And see *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520. And see Rules 5 and 39, and Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 14.

2. *American Ins. Co. v. Replogle*, 114 Ind. 1, 15 N. E. Rep. 810; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 So. Rep. 48, 19 Ins. L. J. 961; *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456. *Contra*, *Dahlberg v. St. Louis Ins. Co.*, 6 Mo. App. 121. And see Rules

3. *Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658, 16 Ins. L. J. 112.

4. *Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658, 16 Ins. L. J. 112.

5. *Milwaukee Mechanics' Ins. Co. v. Graham*, 181 Ill. 158, 54 N. E. Rep. 914; *Folb v. Phoenix Ins. Co.*, 109 N. C. 568, 13 S. E. Rep. 798.

RULE 36.

As Affected by Question of Validity.

Other insurance must be valid insurance to render the policy void; void or invalid insurance is not other insurance;¹ the fact that insured claims and receives payment of the other insurance does not estop him in suit on another policy from asserting that such other insurance was inoperative or invalid;² if validity of a policy asserted to be other insurance is material its validity must be determined as of the time of its issue, and not at time of the loss.³

1. *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1, 10 Ins. L. J. 354; *Jackson v. Farmers' Ins. Co.*, 5 Gray, 52 (Mass.); *Sweeting v. Mutual Ins. Co.*, 83 Md. 63, 34 Atl. Rep. 826, 25

Ins. L. J. 730, 32 L. R. A. 570; *Farmers' Ins. Co. v. Newman*, 58 Nebr. 504, 78 N. W. Rep. 933; *Woolpert v. Franklin Ins. Co.*, 42 W. Va. 647, 26 S. E. Rep. 531. And see *Woolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. Rep. 1024, where it seems to be so held notwithstanding the words "valid or not;" *Gale v. Belknap*, 41 N. H. 170; *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325; *Sutherland v. Old Dominion Ins. Co.*, 31 Gratt. 176 (Va.); *Insurance Co. v. Holt*, 35 Ohio St. 189; *Knight v. Eureka Ins. Co.*, 26 Ohio St. 664; *Leibrandt v. Firemen's Ins. Co.*, 35 Fed. Rep. 30; *Germania Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. Rep. 489, 19 Ins. L. J. 126.

2. *Thomas v. Builders' Ins. Co.*, 119 Mass. 121; *Hayes v. Milford Ins. Co.*, 170 Mass. 492, 49 N. E. Rep. 754, 27 Ins. L. J. 459; *Insurance Co. v. Holt*, *supra*; *Firemen's Ins. Co. v. Holt*, 35 Ohio St. 189, 9 Ins. L. J. 212. And see *Folb v. Phoenix Ins. Co.*, 109 N. C. 568, 13 S. E. Rep. 798.

3. *Equitable Ins. Co. v. McCrea*, 8 Lea, 541 (Tenn.).

RULE 37.

Construction and Object of Insertion of the Words "Valid or Not."

When the policy in terms provides that it shall be void by reason of other insurance, whether "valid or not," subsequent insurance in form having any existence, even though not binding and enforceable, is other insurance causing a forfeiture;¹ and so in action upon the subsequent policy wherein the defense of other insurance is pleaded, the insured cannot claim invalidity of the first policy;² the words "valid or not" include an invalid policy, and a policy is avoided by the insured procuring, without consent, a policy from another company on same property, although the last policy is also void because it contains the same condition;³ it is no answer to a defense founded upon the existence of the other insurance that such insur-

ance is invalid,⁴ the words “whether valid or not” were inserted to prevent any controversy as to the validity or invalidity of a policy claimed to be other insurance, and should not be disregarded.⁵

1. *Donogh v. Farmers' Ins. Co.*, 104 Mich. 503, 62 N. W. Rep. 721, 25 Ins. L. J. 472; *Hughes v. Insurance Co. N. A.*, 40 Nebr. 626, 59 N. W. Rep. 112, 23 Ins. L. J. 721; *Stormes v. Southern California Ins. Co.*, 26 S. W. Rep. 1104 (Tex.); *Sugg v. Hartford Ins. Co.*, 98 N. C. 143, 3 S. E. Rep. 732; *Stevenson v. Phoenix Ins. Co.*, 83 Ky. 7.

2. *Reed v. Equitable Ins. Co.*, 17 R. I. 785, 24 Atl. Rep. 833, 21 Ins. L. J. 821.

3. *Wilson v. Aetna Ins. Co.*, 12 Tex. Civ. App. 512, 33 S. W. Rep. 1085.

4. *Phoenix Ins. Co. v. Lamar*, 106 Ind. 513, 15 Ins. L. J. 686.

5. *Continental Ins. Co. v. Hulman*, 92 Ill. 145, 157. And see *Royal Ins. Co. v. McCrea*, 8 Lea, 531, 11 Ins. L. J. 508 (Tenn.); *Stevenson v. Phoenix Ins. Co.*, 83 Ky. 7, 14 Ins. L. J. 65; *Funke v. Minnesota Ins. Assoc.*, 29 Minn. 347, 11 Ins. L. J. 830; *Emery v. Mutual City Ins. Co.*, 51 Mich. 469, 12 Ins. L. J. 929; *Behrens v. Germania Ins. Co.*, 64 Iowa, 19, 13 Ins. L. J. 653.

RULE 38.

Effect of the Words “Valid or Not.”

To a claim upon a policy containing a condition against other insurance without the words “valid or not,” it is no defense that there are other policies, obtained either before or after the policy in question, such other policies containing similar conditions against other insurance but with the added words “whether valid or not;” if the other policy was obtained before, it becomes void by its terms as soon as policy in question issues; if issued subsequently, by the same terms, it is void or never takes effect;¹ and even the fact that the claimant has also made claim against

such other company and received payment, does not affect his rights under the policy in question.²

1. *Hayes v. Milford Ins. Co.*, 170 Mass. 492, 49 N. E. Rep. 754, 27 Ins. L. J. 459.

2. *Hayes v. Milford Ins. Co.*, *supra*; *Thomas v. Builders' Ins. Co.*, 119 Mass. 121.

RULE 39.

Policy Voidable Only.

The policy does not become absolutely void upon the existence or procuring of the other insurance, but voidable only at the option of the insurance company;¹ a policy cannot be claimed to be void or inoperative as other insurance when the insured makes claim and receives payment on account of it.²

1. *German Ins. Co. v. Emporia Loan Assoc.*, 9 Kans. App. 803, 59 Pac. Rep. 1092; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325; *Stevenson v. Phoenix Ins. Co.*, 83 Ky. 7.

2. *Bigler v. New York Central Ins. Co.*, 22 N. Y. 402; *German Ins. Co. v. Emporia Loan Assoc.*, 9 Kans. App. 803, 59 Pac. Rep. 1092; *David v. Hartford Ins. Co.*, 13 Iowa, 69. And see *Gauthier v. Waterloo Ins. Co.*, 44 Up. Can. Q. B. 490.

RULE 40.

Estoppel by Issue and Delivery of Policy or Renewal With Knowledge of Facts.

Issue and delivery of a policy with knowledge by the company or its agent of existing other insurance operates as a waiver or estoppel preventing the company from claiming a forfeiture by reason of such fact;¹ and same rule applies to a renewal,² and so the company is estopped whenever the insured is misled by fraudulent conduct or misstatements of its agent.³

When policy issues with knowledge of company's agent as to amount of other existing insurance, the continuance of latter, either by renewals or substitution of other policies, does not make it other insurance within the meaning of the policy.⁴ Knowledge of the agent will not be assumed from mere fact that there was sufficient to put him on inquiry, his knowledge must be shown as a distinct fact, and he does not have such knowledge where by mistake he supposes the other insurance has expired.⁵

1. *Stage v. Home Ins. Co.*, 76 App. Div. 509, 78 N. Y. Supp. 555; *Lewis v. Guardian Assur. Co.*, 93 App. Div. 157, 87 N. Y. Supp. 525, aff'd, 181 N. Y. 392, 74 N. E. Rep. 224; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195; *Richmond v. Niagara Ins. Co.*, 79 N. Y. 230; *McCarty v. Imperial Ins. Co.*, 126 N. C. 820, 36 S. E. Rep. 284; *Collins v. Insurance Co.*, 79 N. C. 280; *Gandy v. Orient Ins. Co.*, 52 S. C. 224, 29 S. E. Rep. 555, 27 Ins. L. J. 575; *Madden & Co. v. Phoenix Assur. Co.*, S. C. , 49 S. E. Rep. 855; *Spalding v. New Hampshire Ins. Co.*, 71 N. H. 441, 52 Atl. Rep. 858; *Osborne v. Phoenix Ins. Co.*, 23 Utah, 428, 64 Pac. Rep. 1103; *Mutual Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. Rep. 209; *Insurance Co. N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. Rep. 471; *Swaine v. Macon Ins. Co.*, 102 Ga. 96, 29 S. E. Rep. 147; *City Ins. Co. v. Carrugi*, 41 Ga. 660; *Home Ins. Co. v. Bernstein*, 55 Nebr. 260, 75 N. W. Rep. 839, 28 Ins. L. J. 73; *Home Ins. Co. v. Hammang*, 44 Nebr. 566, 62 N. W. Rep. 883, 24 Ins. L. J. 493; *First Nat. Bank v. American Central Ins. Co.*, 58 Minn. 492, 60 N. W. Rep. 345, 24 Ins. L. J. 55; *Strauss v. Phenix Ins. Co.*, 9 Colo. App. 386, 48 Pac. Rep. 822, 26 Ins. L. J. 676; *Johnson v. Farmers' Ins. Co.*, Iowa, , 102 N. W. Rep. 502; *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. Rep. 261; *Hagan v. Merchants' Ins. Co.*, 81 Iowa, 321, 46 N. W. Rep. 1114, 20 Ins. L. J. 306; *Gurnett v. Atlas Mutual Ins. Co.*, Iowa, 100 N. W. Rep. 542; *Niagara Ins. Co. v. Johnson*, 4 Kans. App. 16, 45 Pac. Rep. 789; *Crescent Ins. Co. v. Griffin*, 59 Tex. 509; *Hibernia Ins. Co. v. Malevinsky*, 6 Tex. Civ. App. 81, 24 S. W. Rep. 804, 23 Ins. L. J. 593; *McCollum v. Hartford Ins. Co.*, 67 Mo. App. 76; *Horwitz v. Equitable Ins. Co.*, 40

Mo. 557; *Hayward v. National Ins. Co.*, 52 Mo. 181; *Equitable Ins. Co. v. Alexander*, Miss. , 12 So. Rep. 25; *Reed v. Equitable Ins. Co.*, 17 R. I. 785, 24 Atl. Rep. 833, 21 Ins. L. J. 821; *Hartford Ins. Co. v. Redding*, Fla. , 37 So. Rep. 62; *Philadelphia Underwriters v. Bigelow*, Fla. , 37 So. Rep. 210; *London Assur. Co. v. Saxton*, 55 Ill. App. 664; *New England Ins. Co. v. Schettler*, 38 Ill. 166; *Insurance Co. N. A. v. McDowell*, 50 Ill. 120; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *Von Bories v. United Ins. Co.*, 8 Bush, 133 (Ky.); *Kenton Ins. Co. v. Shea*, 6 Bush, 174; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368 (U. S. Cir.); *Farmers' Ins. Co. v. Taylor*, 73 Pa. St. 342; *Sherman v. Madison Ins. Co.*, 39 Wis. 104; *Roberts v. Continental Ins. Co.*, 41 Wis. 321; *American Ins. Co. v. Gallatin*, 48 Wis. 36; *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. Rep. 1059, 23 Ins. L. J. 401. And see *Kitchen v. Hartford Ins. Co.*, 57 Mich. 135, 23 N. W. Rep. 616.

2. *Carroll v. Charter Oak Ins. Co.*, 1 Abb. Ct. App. Dec. 316, 10 Abb. N. S. 166 (N. Y.); *Pechner v. Phoenix Ins. Co.*, 6 Lans. 411, aff'd, 65 N. Y. 195; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

3. *McKenzie v. Insurance Co.*, 9 Heisk. 261 (Tenn.); *Rivara v. Queens Ins. Co.*, 62 Miss. 720.

4. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Brown v. Cattaraugus Ins. Co.*, 18 N. Y. 385; *Lewis v. Guardian Ins. Co.*, 93 App. Div. 157, 87 N. Y. Supp. 525, aff'd, 181 N. Y. 392, 74 N. E. Rep. 224. And see *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195. Compare *Hutchinson v. Western Assur. Co.*, 21 Mo. 97.

5. *Sanders v. Cooper*, 115 N. Y. 279, 22 N. E. Rep. 212. See Rule 14.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 19.

This rule which seems now to be generally firmly established throughout the country as one of law, notwithstanding the late decision of the United States Supreme Court in *Northern Assur. Co. v. Grandview Building Assoc.*, 183 U. S. 308 (see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 8 and 16 and following Rule 41) would appear to have had its origin in equity. See *National Ins. Co. v. Crane*, 16 Md. 260.

RULE 41.

Issue and Delivery of Policy with Knowledge Does not Operate as a Waiver — Parol Evidence.

Issue and delivery of a policy with knowledge by the company's agent of the existence of other insurance does not operate as a waiver; parol evidence is not admissible to affect the express terms of the contract.

Northern Assur. Co. v. Grandview Building Assoc., 183 U. S. 308, 22 Sup. Ct. Rep. 133, rev'g 101 Fed. Rep. 77, 41 C. C. A. 207, overruling prior cases in the Federal courts such as *McElroy v. British-American Ins. Co.*, 94 Fed. Rep. 990, and others. And see *Hartford Ins. Co. v. Small*, 66 Fed. Rep. 490, 14 C. C. A. 33, 30 U. S. App. 127; *Bennett v. St. Paul F. & M. Ins. Co.*, 55 N. J. L. 377, 27 Atl. Rep. 641; *Pendar v. American Ins. Co.*, 12 Cush. 469 (Mass.); *Conway Tool Co. v. Hudson River Ins. Co.*, 12 Cush. 144 (Mass.); *Forbes v. Agawam Ins. Co.*, 9 Cush. 470 (Mass.); *Batchelder v. Queen Ins. Co.*, 135 Mass. 449, 12 Ins. L. J. 813. And see *Hendrickson v. Queen Ins. Co.*, 31 Up. Can. Q. B. 547; *Shannon v. Gore District Ins. Co.*, 2 Ont. App. 396 (Can.); *Billington v. Provincial Ins. Co.*, 3 Duval, 182 (Can.), though this last case admits that there might be an estoppel if the agent knew the *amount* of the other insurance. See Rule 40, and this volume, "Warranty," Rules 28, 29, note.

See Vol. 1, Fire Insurance as a Valid Contract, "Waiver," Rule 8, and note.

RULE 42.

When Knowledge of Agent not That of the Company.

When the agent acquires knowledge of the other insurance obtained or existing in violation of the condition, by virtue of his relation as attorney for the insured, and in a transaction with which the company was not connected, his knowledge is not the knowledge of the company, nor is it estopped thereby, nor can a waiver be predicated thereon.

Union Nat. Bank v. German Ins. Co., 71 Fed. Rep. 473, 34 U. S. App. 397, 18 C. C. A. 203, 25 Ins. L. J. 539.

And see Vol. 1, Fire Insurance as a Valid Contract, "Waiver," Rule 17.

RULE 43.

Knowledge of the Company's Soliciting Agent — Authority — Question of Fact.

An agent authorized or employed by the insurance company to solicit the application for insurance binds the company by his knowledge of the existence of other insurance when policy issues and is delivered through and by him as its agent;¹ but notice to, knowledge, or acts of such an agent after issue and delivery of the policy do not bind the company.² If an agent is authorized to receive notice of the other insurance and forward the policy for action by the company, and to return it to the insured, he is clothed with apparent authority, and what he says and does during the course of the communication binds the company.³ The insured must have notice of limitations upon the agent's authority.⁴ An agent to take and forward applications may be the insured's agent, and if he is, the company is not affected by his knowledge of the existence of other insurance;⁵ agency is or may be a question of fact.⁶

1. *Wolf v. Dwelling-House Ins. Co.*, 86 Mo. App. 580; *Turner v. Providence-Washington Ins. Co.*, 86 Mo. App. 387; *Rogers v. Farmers' Assoc.*, 50 S. W. Rep. 543 (Ky.); *McBryde v. South Carolina Ins. Co.*, 55 S. C. 589, 594, 33 S. E. Rep. 729; *Brandup v. St. Paul Ins. Co.*, 27 Minn. 393, 10 Ins. L. J. 228; *Gurnett v. Atlas Mutual Ins. Co.*, Iowa, , 100 N. W. Rep. 542; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600, 16 Ins. L. J. 774; *Hagan v. Merchants' Ins. Co.*, 81 Iowa, 321. 46 N. W. Rep. 1114, 20 Ins. L. J. 306; *Kitchen v. Hartford Ins. Co.*, 57 Mich. 135, 14 Ins. L. J. 594. *Contra*, *Billington v. Canadian Ins. Co.*, 39 Up. Can. Q. B. 433.

2. *Alabama State Ins. Co. v. Long Clothing Co.*, 123 Ala. 667, 26 So. Rep. 655; *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 So. Rep. 116; *Healey v. Imperial Ins. Co.*, 5 Nev. 268; *Heath*

v. Springfield Ins. Co., 58 N. H. 414; *American Ins. Co. v. Hampton*, 54 Ark. 75, 14 S. W. Rep. 1092; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 So. Rep. 48, 19 Ins. L. J. 961; *Wilson v. Genesee Ins. Co.*, 14 N. Y. 418.

3. *Redstrake v. Cumberland Ins. Co.*, 44 N. J. L. 294.

4. *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Kenton Ins. Co. v. Shea*, 6 Bush, 174 (Ky.).

5. *Reed v. Equitable Ins. Co.*, 17 R. I. 785, 24 Atl. Rep. 833, 21 Ins. L. J. 821.

6. See this volume, chapter "Agents."

RULE 44.

**Effect of Expression of Intention to Procure Other Insurance —
Opinion of Agent — Written Consent.**

When there is no other insurance at the time of the issue of a certain policy, the fact that the insured informed the company's agent when he obtained it, of his intention to subsequently procure other insurance, is insufficient to establish a waiver or estoppel; the insured is not thereby relieved from the necessity of procuring the written consent of the company to such other insurance if, and when, procured;¹ unless the agent knows that the other insurance is to be *immediately* procured.² A representation by the agent that the taking by the insured of additional insurance would not violate condition of the policy is not a representation of a fact, but of an opinion or conclusion of law, not binding upon the company.³ But this does not prevent the agent from stating that further insurance will be all right if it does not exceed limit as to amount.⁴ The company may give sufficient written consent without writing same on the policy.⁵

1. *Gray v. Germania Ins. Co.*, 155 N. Y. 180, 49 N. E. Rep. 675, 27 Ins. L. J. 474; *Commercial Union Assur. Co. v. Nord-*

wood, 57 Kan. 610, 47 Pac. Rep. 529, 26 Ins. L. J. 177, criticising Fireman's Fund Ins. Co. v. Norwood, 69 Fed. Rep. 71, 16 C. C. A. 136. And see able dissenting opinion in this case by Sanborn, C. J.; United Firemen's Ins. Co. v. Thomas, 82 Fed. Rep. 406, 27 C. C. A. 42; Frankfurter v. Home Ins. Co., 10 Misc. 157, 31 N. Y. Supp. 3, 24 Ins. L. J. 76; Orient Ins. Co. v. Prather, 25 Tex. Civ. App. 446, 62 S. W. Rep. 89, apparently overruling Hartford Ins. Co. v. McLemore, 7 Tex. Civ. App. 317, 26 S. W. Rep. 928, 23 Ins. L. J. 788; Lippman v. Aetna Ins. Co., 108 Ga. 391, 33 S. E. Rep. 897, 28 Ins. L. J. 886; Morris v. Orient Ins. Co., 106 Ga. 472, 33 S. E. Rep. 430, 28 Ins. L. J. 643; Home Ins. Co. v. Wood, 50 Nebr. 381, 69 N. W. Rep. 941, 26 Ins. L. J. 686; Conway Tool Co. v. Hudson River Ins. Co., 12 Cush. 144 (Mass.); Bourgeois v. Northwestern Nat. Ins. Co., 86 Wis. 606, 57 N. W. Rep. 347, 23 Ins. L. J. 860. And see Healey v. Imperial Ins. Co., 5 Nev. 268; Kimball v. Howard Ins. Co., 8 Gray, 33 (Mass.); Forbes v. Agawam Ins. Co., 9 Cush. 470 (Mass.). *Contra*, Carrugi v. Atlantic Ins. Co., 40 Ga. 135. And see New Orleans Ins. Assoc. v. Griffin, 66 Tex. 232, 15 Ins. L. J. 503; Ordway v. Continental Ins. Co., 35 Mo. App. 426; Brumfield v. Union Ins. Co., 87 Ky. 122, 7 S. W. Rep. 893.

2. Independent School District v. Fidelity Ins. Co., Iowa, 84 N. W. Rep. 956. And see New Orleans Ins. Assoc. v. Griffin, *supra*.

3. Union Nat. Bank v. German Ins. Co., 71 Fed. Rep. 473, 18 C. C. A. 203, 25 Ins. L. J. 539.

And see Vol. 1, Fire Insurance as a Valid Contract. "Waiver," Rule 20.

4. Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. Rep. 236, 20 Ins. L. J. 784.

5. Mattocks v. Des Moines Ins. Co., 74 Iowa, 233, 37 N. W. Rep. 174.

RULE 45.

Limitation upon Agent's Authority After Issue of Policy — Authority Must be Shown.

After the issue of the policy, if the insured contracts or procures other insurance, written consent thereto must be given in writing or indorsed on the policy. An oral waiver of the condition requiring written consent cannot be made in the absence of evidence that the

officer or agent had authority to give such consent, notwithstanding the provisions or limitations in the policy;¹ the authority of the agent to waive written consent after issue of the policy must appear or be shown;² where the restrictions upon an agent's authority appear in the policy, and there is no evidence to show that his powers have been enlarged by usage of the company, its course of business, or by its consent, express or implied, the authority as expressed and limited in the policy is the measure of his power.³ When policy does *not* specifically limit the authority of the agent to make written indorsement only, a general agent authorized to make the contract may orally waive or dispense with written consent.⁴

1. *O'Leary v. Merchants' Ins. Co.*, 100 Iowa, 173, 69 N. W. Rep. 420, aff'g, on rehearing, 66 N. W. Rep. 175, 25 Ins. L. J. 394; *Taylor v. State Ins. Co.*, 98 Iowa, 521, 67 N. W. Rep. 547; *Zimmerman v. Home Ins. Co.*, 77 Iowa, 685, 42 N. W. Rep. 462; *Robinson v. Fire Assoc.*, 63 Mich. 90, 16 Ins. L. J. 65; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 71 Id. 414; *Allemania Ins. Co. v. Hurd*, 37 Mich. 11; *German Ins. Co. v. Heiduk*, 30 Nebr. 288, 46 N. W. Rep. 481, 20 Ins. L. J. 206; *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547, 32 N. E. Rep. 990; *Perry v. Caledonian Ins. Co.*, App. Div. , 93 N. Y. Supp. 50; *Havens v. Home Ins. Co.*, 111 Ind. 90, 16 Ins. L. J. 713. And see *Golden v. Northern Assur. Co.*, 46 Minn. 471, 49 N. W. Rep. 246; *Worcester Bank v. Hartford Ins. Co.*, 11 Cush. 265 (Mass.); *Carpenter v. Providence-Washington Ins. Co.*, 16 Pet. 495 (U. S.); *Hutchinson v. Western Ins. Co.*, 21 Mo. 97; *Day v. Mechanics' Ins. Co.*, 88 Mo. 325.

2. *Alabama State Ins. Co. v. Long Clothing Co.*, 123 Ala. 667, 26 So. Rep. 655. And see *Smith v. Continental Ins. Co.*, 6 Dak. 433, 43 N. W. Rep. 810.

3. *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. Rep. 31, 21 Ins. L. J. 650. And see *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5; *Commonwealth Ins. Co. v. Huntzinger*, 98 Pa. St. 42, 10 Ins. L. J. 618; *Golden v. Northern*

Assur. Co., 46 Minn. 471, 49 N. W. Rep. 246, and see Vol. 1, Fire Insurance as a Valid Contract. "Waiver," Rules 8-16, and this volume, title "Agents."

4. *Goldwater v. Liverpool, L. & G. Ins. Co.*, 39 Hun, 176, aff'd, 109 N. Y. 618, 15 N. E. Rep. 895, 17 Ins. L. J. 365, on opinion below.

(The policy in this case contained the clause in frequent use, prior to adoption of the standard form: "The use of general terms, or anything less than a distinct specific agreement clearly expressed and endorsed on this policy shall not be construed as a waiver of any printed or written condition or restriction therein" and the court held that this was not a limitation as to the particular manner in which the agent should exercise the powers confided to him. And see *Hamilton v. Home Ins. Co.*, 94 Mo. 353, 7 S. W. Rep. 261; *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273; *Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. Rep. 137.

Old forms of policies also contained a clause "Notice of other insurance must be given and endorsed on the policy, or otherwise acknowledged and approved in writing," and it was held that a written acknowledgment of a letter from the insured containing notice of other insurance, was sufficient, and policy continued in force unless canceled.

Potter v. Ontario Ins. Co., 5 Hill, 147 (N. Y.). And see *Westlake v. St. Lawrence Ins. Co.*, 14 Barb. 206.

Mailing notice of other insurance is only presumptive evidence of its receipt, which may be rebutted; it is a question of fact.

McSparran v. Southern Ins. Co., 193 Pa. St. 184, 44 Atl. Rep. 317.

If the policy requires notice, stating the wrong company, if the amount is correct, will not void the policy.

Benjamin v. Saratoga Ins. Co., 17 N. Y. 415.

That notice of other insurance may be given by telephone, see *Sun Mutual Ins. Co. v. Hock*, 8 Ohio C. C. 341.

RULE 46.

Estoppel After Issue of the Policy.

A local agent who issues the policy and is authorized to grant permits for other insurance waives the defense of other insurance or estops the company by

acquiring knowledge or receiving notice of the same and misleading the insured by allowing or inducing him to rely upon the validity of the policy, and failing to cancel same and returning the unearned portion of the premium;¹ an agent with power to make insurance contracts has power to orally waive or consent to additional insurance.² Demand or acceptance of the premium after a fire may be evidence of waiver.³

1. *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. Rep. 889; *Hamilton v. Home Ins. Co.*, 94 Mo. 353, 7 S. W. Rep. 261; *Stavinow v. Home Ins. Co.*, 43 Mo. App. 513; *Kotwicki v. Thuringia Ins. Co.*, 134 Mich. 82, 95 N. W. Rep. 976; *Continental Ins. Co. v. Coons*, 14 Ky. L. Rep. 136; *Swedish-American Ins. Co. v. Knutson*, 67 Kans. 71, 72 Pac. Rep. 526; *Glasscock v. Des Moines Ins. Co.*, Iowa, , 100 N. W. Rep. 503; *Phoenix Ins. Co. v. Grove*, Ill. , 74 N. E. Rep. 141; *German-American Ins. Co. v. Harper*, Ark. , 86 N. W. Rep. 817; *Slobodisky v. Phoenix Ins. Co.*, 52 Nebr. 395, 72 N. W. Rep. 483, 27 Ins. L. J. 53; *Phoenix Ins. Co. v. Holcombe*, 57 Nebr. 622, 78 N. W. Rep. 300, 28 Ins. L. J. 238; *Ætna Ins. Co. v. Eastman*, Tex. Civ. App. , 80 S. W. Rep. 255, rehearing denied, and writ of error denied by the Supreme Court. And see *Kalmutz v. Northern Mutual Ins. Co.*, 186 Pa. St. 571, 40 Atl. Rep. 816; *Insurance Co. v. Lyons*, 38 Tex. 253.

2. *Burnham v. Greenwich Ins. Co.*, 63 Mo. App. 85; *Liverpool, L. & G. Ins. Co. v. Sheffy*, 71 Miss. 919, 16 So. Rep. 307; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. Rep. 236, 20 Ins. L. J. 784. And see *Mentz v. Lancaster Ins. Co.*, 79 Pa. St. 475, where it was held that company might be bound upon an estoppel.

See Rule 45. And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 28.

3. *Lutz v. Anchor Ins. Co.*, 120 Iowa, 136, 94 N. W. Rep. 274.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 45.

See also this volume, "Agents" and "Cancellation."

RULE 47.

Effect of Alteration in Form With Knowledge of Facts — Consent to Assignment.

If company, with knowledge of its agent of the existence of other insurance, procures the policy for purpose of making an alteration in the form attached thereto, and does so, and then returns it as a valid obligation to the assured, it operates as a waiver of the condition as to other insurance;¹ and such is the effect of a consent to assignment of the policy.²

1. *American Ins. Co. v. First Nat. Bank*, 73 Miss. 469, 18 So. Rep. 931. And see *Kotwicki v. Thuringia Ins. Co.*, 134 Mich. 82, 95 N. W. Rep. 976.

2. *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256.

And see this volume, "Assignment of Policy."

RULE 48.

Authority of Agent — Presumption — Evidence.

After policy is issued if the insured desires an indorsement of permission for other insurance, he should obtain such written indorsement from the agent who made, countersigned, and issued the policy to him; while another local agent at a different place may possibly have authority to make such indorsement, such authority will not be assumed from the mere fact that he is a local agent in such place; in the former case authority might be presumed, in the latter it must be established.¹ The company may authorize the agent who procured the policy to make the indorsement.²

1. *Security Ins. Co. v. Fay*, 22 Mich. 467.

2. *Grubbs v. Virginia F. & M. Ins. Co.*, 110 N. C. 108, 14 S. E. Rep. 516, 21 Ins. L. J. 470.

RULE 49.**Authority of Clerk of Company's Agent — Evidence — Broker.**

A person exclusively employed by agents of the company as a solicitor, though his compensation is regulated by the application for insurance he procures, and he has a desk in their office for that business, is a clerk of such agents, and notice to him, or knowledge by him, of the existence of other insurance is knowledge of the company;¹ but a clerk employed to do mere clerical work, such as to copy or fill out policies, receive premiums, or the like, has no authority as such, in absence of some evidence extending its apparent scope, to consent to other insurance, and notice to him is not notice to the company.² An insurance broker as such has no authority to bind the insurance company as to other insurance, though he receives commissions on business procured by him.³

1. *Arff v. Star Ins. Co.*, 125 N. Y. 57, 25 N. E. Rep. 1073, 20 Ins. L. J. 112.

2. *Waldman v. North British & M. Ins. Co.*, 91 Ala. 170, 8 So. Rep. 666, 20 Ins. L. J. 353.

3. *Golden v. Northern Ins. Co.*, 46 Minn. 471, 49 N. W. Rep. 246.

And see this volume, "Agents."

RULE 50.**Company not Bound by Broker's Knowledge.**

An insurance broker, without authority from an insurance company, does not bind it by his knowledge of the existence of other insurance,¹ although a statute regulating foreign insurance companies includes brokers in its definition of agents.² An agent, for mere purpose of receiving and remitting premiums,

has no authority to bind the company as to other insurance.³

1. *United Firemen's Ins. Co. v. Thomas*, 92 Fed. Rep. 127, 34 C. C. A. 240, 28 Ins. L. J. 500, aff'g, on rehearing, 82 Fed. Rep. 406, 27 C. C. A. 42; *Mellen v. Hamilton Ins. Co.*, 5 Duer, 101, aff'd, 17 N. Y. 609; *Fire Assoc. v. Hogwood*, 82 Va. 342, 17 Ins. L. J. 876; *Golden v. Northern Assur. Co.*, 46 Minn. 471, 49 N. W. Rep. 246; *Royal Ins. Co. v. McCrea*, 8 Lea, 531, 11 Ins. L. J. 508 (Tenn.). And see *McLachlan v. Aetna Ins. Co.*, 4 Allen, 173 (N. B.).

2. *United Firemen's Ins. Co. v. Thomas*, *supra*.

3. *East Texas Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. Rep. 572.

RULE 51.

Construction of Written Restriction.

A written clause in the policy that no other insurance is allowed unless by consent of the company may supersede the printed condition requiring written consent, and render an oral consent expressed to the insured by the agent through whom the insurance was effected, after an asserted communication with the company sufficient.

Minnock v. Eureka Ins. Co., 90 Mich. 236, 51 N. W. Rep. 367. And see *Kotwicki v. Thuringia Ins. Co.*, 134 Mich. 82, 95 N. W. Rep. 976.

RULE 52.

Agency in Placing Surplus Line.

Where an agent of an insurance company applies to another agent of another company for its policy to cover a surplus line which the former is unable to put in companies represented by him, and obtains the policy on such surplus line on such application, the first agent is not the agent of the second company so

that the latter is bound by his knowledge of the existence of other insurance,¹ unless his status as agent of second company is fixed by statute.²

1. *McElroy v. British-American Assur. Co.*, 88 Fed. Rep. 863, 28 Ins. L. J. 112.

2. *Schomer v. Hekla Ins. Co.*, 50 Wis. 575, 10 Ins. L. J. 306.

And see this volume, "Agents."

RULE 53.

Agency of Company in Obtaining Policy from Another Company.

When a party applies to an insurance company for the entire amount of insurance desired, and such company obtains a policy for a part of the amount from another company, and delivers the same to the assured, the first company may be regarded as the agent of the latter and not of the assured, and its knowledge of the existence of the other insurance estops the other company from maintaining such a defense.

Mesterman v. Home Mut. Ins. Co., 5 Wash. 524, 32 Pac. Rep. 458, 22 Ins. L. J. 387. See Rule 52.

RULE 54.

When Company Estopped by Silence and Failure to Cancel.

Where the company is advised by letter that the insured has taken out additional insurance, and that the policy is not in his possession but in a bank, that he does not remember its conditions, and in terms requesting to be advised, the insurance company is estopped by its silence and failure to cancel or retention of premium.

Rauch v. Michigan Millers' Ins. Co., 131 Mich. 281, 91 N. W. Rep. 160.

See this volume, "Cancellation."

RULE 55.

Same Subject — Evidence.

If the policy is forwarded by the insured to the company's agent, with information of additional insurance and request for written indorsement of consent, and the agent replies that permission will not be given without certain information, which the insured furnishes, and the agent makes no reply, retains the policy in his possession, but does not cancel it, inducing the insured to believe that the consent is given, it may be sufficient evidence of a waiver or estoppel;¹ and so where the agent grants the permission intending to indorse it in writing upon the policy, but forgets to do so;² and so where the agent indorses consent by his mistake for wrong amount, it may operate as an estoppel;³ or notice is given in a manner requiring the company to act by consenting or refusing.⁴

1. *Phoenix Ins. Co. v. Johnson*, Ill. , 32 N. E. Rep. 429, 22 Ins. L. J. 29, aff'g 42 Ill. App. 66.

2. *German Ins. Co. v. Cain*, 37 S. W. Rep. 657, Tex. Civ. App. . And see *Cobb v. Insurance Co. N. A.*, 11 Kans. 93.

3. *Greene v. Equitable Ins. Co.*, 11 R. I. 434.

4. *Golden v. Northern Assur. Co.*, 46 Minn. 471, 49 N. W. Rep. 246. And see *Cromwell v. Phoenix Ins. Co.*, 47 Mo. App. 109; *Swedish-American Ins. Co. v. Knutson*, 67 Kans. 71, 72 Pac. Rep. 526.

In Canada there appears to be a statute requiring the insurance company to express its dissent on receipt of notice of other insurance. See *McCrea v. Waterloo Ins. Co.*, 26 Up. Can. C. P. 431; *Fair v. Niagara Ins. Co.*, 26 Up. Can. C. P. 398.

RULE 56.

Effect of Mere Omission to Cancel.

The mere omission to cancel the policy after acquiring knowledge of the existence of other insurance does not of itself justify a legal conclusion that the company elects to continue it in force.

Johnson v. American Ins. Co., 41 Minn. 396, 43 N. W. Rep. 59; *Taylor v. State Ins. Co.*, 98 Iowa, 521, 67 N. W. Rep. 577. And see *Hartford Ins. Co. v. Small*, 66 Fed. Rep. 490, 14 C. C. A. 33. See also "Cancellation."

RULE 57.

Mutual Mistake — Reformation.

If there is a mutual mistake as to the total amount of insurance permitted by the terms of the policy, it may be corrected by a suit in equity for reformation of the policy;¹ and so insured may have relief by reformation where an agent has by mistake omitted to express the mutual intent in the policy as to other insurance.²

1. *Fitchner v. Fidelity Ins. Assoc.*, 103 Iowa, 276, 72 N. W. Rep. 530.

2. *Barnes v. Hekla Ins. Co.*, 75 Iowa, 11, 39 N. W. Rep. 122. And see "Reformation."

RULE 58.

Application of Written Permission for Other Insurance.

A written permission for other insurance without notice until required applies to prior or existing as well as to future insurance;¹ but permission for a certain amount of additional insurance, applicable to that amount of existing insurance, should not be construed

as authorizing the same amount of subsequent other insurance.²

1. *Blake v. Exchange Ins. Co.*, 12 Gray, 265 (Mass.); *Fredrick Ins. Co. v. Deford*, 38 Md. 404.

2. *Behrens v. Germania Ins. Co.*, 58 Iowa, 26, 11 Ins. L. J. 787. And see *East Texas Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. Rep. 572.

RULE 59.

Effect of Removal and Merger of Stock.

When a stock of goods insured by a certain policy is removed and merged in another stock, also insured by a policy covering accruing or changeable stock, it creates a case of other or double insurance, rendering former policy void;¹ and so whenever insurance on old stock covers new stock incorporated with it, it is essential to obtain the consent of the company issuing its policy upon the new stock.²

1. *Washington Ins. Co. v. Hayes*, 17 Ohio St. 432.

2. *Peoria Ins. Co. v. Anapow*, 45 Ill. 86. And see *Whitwell v. Putnam Ins. Co.*, 6 Lans. 166 (N. Y.); *Vose v. Hamilton Ins. Co.*, 39 Barb. 302.

RULE 60.

Effect of Renewal — Substitution.

A renewal is not the effecting or procuring of other insurance, but is a mere contract of continuance of existing insurance;¹ and so the substitution or replacing of one policy by another is not other insurance.²

1. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Lewis v. Guardian Assur. Co.*, 93 App. Div. 157, 87 N. Y. Supp. 525.

2. *Lewis v. Guardian Assur Co.*, *supra*.

RULE 61.

Contract Severable.

When under a statute the value of the insured property is stated to be a certain amount, and other insurance is obtained in excess of such amount on both building and personal property, the policy is void as to the building only, the amount of the insurance being separately and specifically named in each case.

Thurber v. Royal Ins. Co., 1 Marv. (Del.) 251, 40 Atl. Rep. 1111. See Delaware Statute, Vol. 1.

And as to the insurance contract being severable when insurance itemized or subject-matter separately insured, see *Mutual Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. Rep. 209. And see Rule 1.

Also Vol. 1, Fire Insurance as a Valid Contract, "Construction," Rule 26, and note .

RULE 62.

Evidence of Other Insurance.

While existence of other insurance may be proved by parol evidence,¹ and be established by sufficient statement in a proof of loss,² a statement therein that there is or was other insurance is not necessarily an admission that the *assured* had or procured it. Insurance had by the insured and other insurance upon the same property do not mean the same thing, and when the insurance company is thus obliged to supplement the statement in the proofs by other evidence the insured has a right to contradict it, and a finding of fact in his favor thereon by a jury becomes conclusive in an appellate court.³ Statements in a proof of loss do not operate as an estoppel against the insured.⁴

1. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *McMaster v. Insurance Co. N. A.*, 55 N. Y. 222.

2. *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Cumberland Ins. Co. v. Giltiwan*, 19 Vroom, 495 (N. J.).

3. *McMaster v. Insurance Co. N. A.*, *supra*.

4. *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325.

And see Vol. 1, *Fire Insurance as Valid Contract*, "Statement or Proof of Loss," Rule 34.

RULE 63.

Burden of Proof — Construction — Evidence — Question of Fact or Law.

The burden rests upon the insurance company of establishing by competent and satisfactory evidence the breach of the condition, and it is the settled policy of the law to construe such a condition strictly;¹ existence of other insurance will not be guessed or assumed merely from similar descriptions,² the application of which, if ambiguous or doubtful, may be shown by parol evidence,³ and may be a question proper to be determined by a jury as one of fact;⁴ but where there is no dispute as to identity, and question is whether terms of the different policies are the same, being a subject of comparison between writings, the question is one to be determined by the court.⁵

1. *Mead v. American Ins. Co.*, 13 App. Div. 476, 43 N. Y. Supp. 334; *Russell v. Fidelity Ins. Co.*, 84 Iowa, 93, 50 N. W. Rep. 546. And see *Sweeting v. Mutual Ins. Co.*, 83 Md. 63, 34 Atl. Rep. 826, 25 Ins. L. J. 730, 32 L. R. A. 570.

2. *Russell v. Fidelity Ins. Co.*, *supra*. And see *Clark v. Hamilton Ins. Co.*, 9 Gray, 148 (Mass.).

3. *Stacey v. Franklin Ins. Co.*, 2 Watts & Serg. 506 (Pa.); *McMaster v. Insurance Co. N. A.*, 55 N. Y. 222.

4. *Neve v. Columbia Ins. Co.*, 2 McMullan, 220 (S. C.); *Mitchell v. Lycoming Ins. Co.*, 51 Pa. St. 402.

5. *Mitchell v. Lycoming Ins. Co.*, 51 Pa. St. 402.

CHAPTER FIFTH.

Relating to Interest or Title.

- TITLE 1.**
1. Insurable interest.
 2. Statement of interest.
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 4. Building on ground not owned in fee simple.
 5. Incumbrance by chattel mortgage.
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TITLE 1.

Insurable Interest.

- RULE 1.** Must be alleged and proved — Exception — Presumption.
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 7. Pleading and evidence.
 8. Who has an insurable interest.
 9. When no insurable interest.

RULE 1.

Must be Alleged and Proved — Exception — Presumption.

It is a general rule that an insurable interest in the property must be alleged and proved to have existed at time of the issue of the policy, and at time of the fire or loss;¹ there is an exception when the policy attaches to and covers property acquired subsequent to its delivery; in such a case it is sufficient

to allege and prove insurable interest subsisting during the risk and at time of the fire or loss.² An allegation of existence of insurable interest at time of issue of policy in a pleading may create such legal presumption of the continuance of such fact to time of loss as to make it good as a pleading against a demurrer,³ but ordinarily the law does not presume ownership at time of loss from fact of its existence at time of the issue of the policy,⁴ and in some States the policy itself is regarded as *prima facie* proof of interest, and if not pleaded it is no ground of demurrer, and the issue must be raised by answer.⁵

1. *Davis v. New England Ins. Co.*, 70 Vt. 217, 39 Atl. Rep. 1095; *Dickerman v. Vermont Ins. Co.*, 67 Vt. 99, 30 Atl. Rep. 808, 24 Ins. L. J. 472; *Bryan v. Farmers' Assoc.*, 81 App. Div. 542, 81 N. Y. Supp. 145; *Continental Fire Assoc. v. Bearden*, Tex. Civ. App. , 69 S. W. Rep. 982; *Pope v. Glens Falls Ins. Co.*, 136 Ala. 670, 34 So. Rep. 29; *Bennett v. Mutual Ins. Co.*, Md. , 60 Atl. Rep. 99; *German Ins. Co. v. Everett*, 36 S. W. Rep. 125 (Tex.); *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. Rep. 628; *Gustin v. Concordia Ins. Co.*, 90 Mo. App. 373; *Harness v. National Ins. Co.*, 62 Mo. App. 245; *White v. Merchants' Ins. Co.*, 93 Mo. App. 282; *Milwaukee Ins. Co. v. Todd*, 32 Ind. App. 214, 67 N. E. Rep. 697; *Vernon Ins. Co. v. Bank of Toronto*, 29 Ind. App. 678, 65 N. E. Rep. 23; *Farmers' Ins. Co. v. Burris*, 23 Ind. App. 507; *Phenix Ins. Co. v. Benton*, 87 Ind. 132, 11 Ins. L. J. 634; *Chrisman v. State Ins. Co.*, 16 Oreg. 283, 18 Pac. Rep. 466; *Monroe v. Southern Ins. Co.*, 63 Ga. 669; *Howard v. Lancashire Ins. Co.*, 11 Duval, 92 (Can. Sup.).

2. *Davis v. New England Ins. Co.*, *supra*; *Sun Ins. Office v. Merz*, 64 N. J. L. 301, 45 Atl. Rep. 785. And see *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252.

3. *Roussel v. St. Nicholas Ins. Co.*, 9 Jones & Sp. 279 (N. Y.).

4. *Royal Ins. Co. v. Horton*, 14 Ins. L. J. 871 (Ky.).

5. *Tabor v. Goss Mfg. Co.*, 11 Colo. 419. And see *American Ins. Co. v. Landfare*, 56 Nebr. 482, 76 N. W. Rep. 1068.

Insured may be relieved from the necessity of alleging insurable interest by statute.

People's Ins. Co. v. Heart, 24 Ohio St. 331; *Commercial Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320.

As to necessity of alleging and proving an insurable interest at time of contract and at time of loss, see also *Freeman v. Fulton Ins. Co.*, 38 Barb. 247; *Murdock v. Chenango Ins. Co.*, 2 N. Y. 210; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Prussian Nat. Ins. Co. v. Peterson*, Ind. App. , 64 N. E. Rep. 102; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559, 52 N. E. Rep. 821; *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. Rep. 265, 27 Ins. L. J. 187; *Farmers' Ins. Co. v. Moore*, 48 Nebr. 713, 67 N. W. Rep. 764, 25 Ins. L. J. 785.

RULE 2.

Reason for Necessity of Allegation and Proof of Insurable Interest — Not Subject of Waiver.

The reason for the necessity of alleging and proving an insurable interest is that the policy in law, independent of its conditions, is void as a wagering contract, unless the insured had and has an insurable interest. Such interest and the loss to it constitutes the foundation of his right of action upon the contract,¹ and is not subject of waiver.²

1. *Gustin v. Concordia Ins. Co.*, 90 Mo. App. 373, 376; *Waugh v. Beck*, 114 Pa. St. 422; *Freeman v. Fulton*, 38 Barb. 247; *Baldwin v. State Ins. Co.*, 60 Iowa, 497, 12 Ins. L. J. 371.

2. *Agricultural Ins. Co. v. Montague*, 38 Mich. 548.

RULE 3.

Test of Insurable Interest — Does not Depend on Title or Possession — Equitable Interest.

A party has an insurable interest in property from the existence of which he receives a benefit or from the destruction of which he will suffer a pecuniary loss; it is not necessary that he should have title or possession;¹ an equitable interest is an insurable interest.²

1. *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. Rep. 1078, aff'g 64 Ill. App. 30; *Burke v. Continental Ins. Co.*,

App. Div. , 91 N. Y. Supp. 402; *Hebner v. Palatine Ins. Co.*, 55 Ill. App. 275; *Key v. Continental Ins. Co.*, 101 Mo. App. 344, 74 S. W. Rep. 162; *Doyle v. American Ins. Co.*, 181 Mass. 139, 63 N. E. Rep. 394; *Wainer v. Milford Ins. Co.*, 153 Mass. 335; *Farmers & Merchants' Ins. Co. v. Mickel*, Nebr. , 100 N. W. Rep. 130; *Hanover Ins. Co. v. Bohn*, 48 Nebr. 743, 25 Ins. L. J. 681, 67 N. W. Rep. 774; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. Rep. 1115; *Stone v. Granite State Ins. Co.*, 69 N. H. 438, 45 Atl. Rep. 235; *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466; *American Central Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. Rep. 249; *Sussex County Ins. Co. v. Woodruff*, 2 Dutch. 541 (N. J.).

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to Fire Insurance Contract," Rule 1, note .

2. *Gerringer v. North Carolina Home Ins. Co.*, 133 N. C. 407, 45 S. E. Rep. 773.

RULE 4.

May be Representative as Well as Personal.

Whoever may be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally, or as the agent or representative of the rights and interest of another, has an insurable interest. Where a policy is issued to a person so situated, covering or including such interests, he can recover the whole value of the property, and after satisfaction of his own special interest the balance will be held by him in trust for the owners.

Hope Oil Mill Compress Co. v. Phoenix Ins. Co., 74 Miss. 320, 26 Ins. L. J. 995, 21 So. Rep. 132. And see *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Bicknell v. Lancaster Ins. Co.*, 58 N. Y. 677; *Kline v. Queen Ins. Co.*, 7 Hun, 267, aff'd, 69 N. Y. 614, without opinion; *Ætna Ins. Co. v. Jackson*, 16 B. Mon. 242 (Ky.); *Bobbitt v. Liverpool, L. & G. Ins. Co.*, 66 N. C. 70.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to the Fire Insurance Contract."

RULE 5.**Existence of an Insurable Interest no Answer to Violation or Breach of Conditions in Policy.**

The necessity of alleging and proving the existence of an insurable interest to prevent the policy from being void in law as a wagering contract is entirely distinct and independent from the legal operative force of the terms and conditions of the policy as a contract. In other words, the existence of an insurable interest is no answer to a violation of such terms and conditions. An interest may be insurable, yet it may not be unconditional and sole ownership within the meaning and operation of the contract. An interest may be legally insurable, but it does not necessarily follow that it is insured or covered and included under the terms of the contract.

Grabbs v. Farmers' Ins. Co., 125 N. C. 389, 34 S. E. Rep. 503; *Pittsburg Storage Co. v. Scottish Union & Nat. Ins. Co.*, 168 Pa. St. 522, 32 Atl. Rep. 58, 24 Ins. L. J. 781; *Brooks v. Erie Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748. And see *Hamburg-Bremen Ins. Co. v. Lewis*, 4 App. Cas. D. C. 66.

RULE 6.**Effect of Adjudication in Bankruptcy.**

The insurable interest of the assured does not cease with an adjudication by a bankruptcy court that he is a bankrupt.

Fuller v. New York Ins. Co., 184 Mass. 12, 67 N. E. Rep. 879.

RULE 7.**Pleading and Evidence.**

A statement in the petition or complaint describing the property of the insured as "his" creates an

inference of interest or ownership at least sufficient after verdict to support the judgment;¹ so a general allegation of ownership after verdict may be sufficient to sustain insurable interest both at time of issue of policy and at time of loss.² A defective statement as to insurable interest, if any is alleged, cannot be reached by objection to the introduction of testimony.³ When policy describes the property insured as "his property," testimony that assured was in possession may be *prima facie* evidence of interest or ownership;⁴ a general statement as to interest or ownership is sufficient as against a general demurrer.⁵

1. *Bondurant v. German Ins. Co.*, 73 Mo. App. 477; *Rogers v. Western Home Ins. Co.*, 93 Mo. App. 24, overruling *Clevinger v. Insurance Co.*, 71 Mo. App. 73.

2. *Prendergrast v. Dwelling-House Ins. Co.*, 67 Mo. App. 426.

3. *Prendergrast v. Dwelling-House Ins. Co.*, *supra*.

4. *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526, 67 N. W. Rep. 1125, 25 Ins. L. J. 848; *Canfield v. Watertown Ins. Co.*, 55 Wis. 419, 12 Ins. L. J. 111.

5. *Pennsylvania Ins. Co. v. Jameson*, Tex. Civ. App., 73 S. W. Rep. 418; *American Central Ins. Co. v. White*, Tex. Civ. App., 73 S. W. Rep. 827; *Western Assur. Co. v. Ackerman*, 2 Pennyp. 144 (Pa.).

In Nebraska the courts go so far as to hold that the policy itself is *prima facie* evidence of admission by the insurance company of interest or ownership of the insured.

Farmers & Merchants' Ins. Co. v. Peterson, 47 Nebr. 747, 66 N. W. Rep. 847; *American Ins. Co. v. Landfare*, 56 Nebr. 482, 76 N. W. Rep. 1068. And see *Tabor v. Goss Mfg. Co.*, 11 Colo. 419; *German Ins. Co. v. Gibbs*, 35 S. W. Rep. 679 (Tex.).

And see Rule 1.

RULE 8.

Who Has an Insurable Interest.

Vendee in possession under an executory contract of sale;¹ attaching creditor;² party's liability for grain under warehouse receipt and right to share in profits

in payment of salary;³ stockholder;⁴ owner of land in building being constructed under contract;⁵ party under contract to cut, deliver, and store ice, though stored in house belonging to another;⁶ creditor in building of deceased debtor, personal property being insufficient to pay debts;⁷ agent, trustee, or attorney of mortgagee;⁸ vendee of personal property under conditional contract of sale;⁹ husband as tenant by curtesy initiate;¹⁰ agent whose profits under an agreement with his company may be affected by loss or destruction of property;¹¹ vendee in property transferred in fraud of creditors;¹² tenant at will;¹³ husband retaining possession and use on conveyance to wife;¹⁴ superintendent operating manufacturing plant under contract giving him pecuniary profit or interest in preservation of property;¹⁵ carrier's liability for loss of goods or property;¹⁶ landlord in furniture of tenant when right to distrain has not been abolished;¹⁷ husband as trustee of wife under a statute;¹⁸ vendor under an executory contract of sale, vendee in possession;¹⁹ party in goods purchased on credit;²⁰ contractor and builder;²¹ shipping broker in advances and interest;²² of husband in building erected by him on wife's land;²³ of wife in building erected partially with her earnings;²⁴ husband in possession under agreement of his wife that amount is due from her and that it shall be a lien;²⁵ of wife in property conveyed to her in fraud of creditors;²⁶ interest of a widow;²⁷ husband in possession of personal property under claim of a verbal transfer from his wife;²⁸ partner's interest in copartnership property;²⁹ tenant or leasehold;³⁰ when lessee bound to replace;³¹ of lessor in building erected by

lessee;³² purchaser at execution sale;³³ any interest under an executory contract while such contract subsists;³⁴ of vendor under an executory contract of sale;³⁵ mechanic's lien or builder's interest;³⁶ of mortgagee;³⁷ mortgagor,³⁸ who may have insurable interest even after sale on foreclosure, until his right to redemption expires;³⁹ executor or administrator;⁴⁰ but that of administrator in building may depend on fact whether estate is insolvent or personal estate insufficient to pay debts;⁴¹ in profits;⁴² railroad company under statute in adjacent property for which liable if destroyed by fire;⁴³ sheriff, for goods held by him under process;⁴⁴ trustee;⁴⁵ of the State;⁴⁶ owner of property sold on execution exists until right to redeem expires;⁴⁷ liability for tax on whisky lost while stored in warehouse;⁴⁸ warehousemen as bailees;⁴⁹ property conveyed in fictitious name;⁵⁰ life interest;⁵¹ assignee of insolvent;⁵² patentee in royalties;⁵³ bailee or agent;⁵⁴ homestead;⁵⁵ contractor moving houses;⁵⁶ pipe-line company, oil in pipes;⁵⁷ liability under an executory contract to take care of building;⁵⁸ advances on account of a vessel;⁵⁹ an equitable interest is an insurable interest.⁶⁰

1. *Brooks v. Erie Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748, aff'd, 177 N. Y. 572, on opinion below; *Tyler v. Ætna Ins. Co.*, 16 Wend. 385, 12 Wend. 507; *McGivney v. Phoenix Ins. Co.*, 1 Wend. 85; *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 680, 24 Ins. L. J. 161; *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396, 16 Ins. L. J. 129; *Farmers' Ins. Co. v. Meckes*, 10 Ins. L. J. 707 (Pa.); *Tuckerman v. Home Ins. Co.*, 9 R. I. 414. And see *Gilman v. Dwelling-House Ins. Co.*, 81 Me. 488, 17 Atl. Rep. 544; *MacCutcheon v. Ingraham*, 32 W. Va. 378, 9 S. E. Rep. 260; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. Rep. 118.

An insurable interest of a vendee under an executory contract may exist though he does not have possession.

See Rules 3-5, and *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25 (U. S.); *Brewer v. Herbert*, 30 Md. 301; *Acer v. Merchants' Ins. Co.*, 57 Barb. 68 (N. Y.).

2. *Donnell v. Donnell*, 86 Me. 518, 30 Atl. Rep. 67, 24 Ins. L. J. 371.

3. *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 37 N. E. Rep. 460, 23 Ins. L. J. 624.

4. *Crawford v. Aachen & Munich Ins. Co.*, 100 Ill. App. 454, aff'd, 199 Ill. 367, 65 N. E. Rep. 134; *Riggs v. Commercial Ins. Co.*, 125 N. Y. 7, 25 N. E. Rep. 1058, 20 Ins. L. J. 107; *Seaman v. Enterprise Ins. Co.*, 18 Fed. Rep. 250, 14 Ins. L. J. 97; *Warren v. Davenport Ins. Co.*, 31 Iowa, 464. But see *Sweeney v. Franklin Ins. Co.*, 20 Pa. St. 337.

5. *Foley v. Manufacturers & Builders' Ins. Co.*, 152 N. Y. 131, 46 N. E. Rep. 318, 26 Ins. L. J. 598.

6. *North British & M. Ins. Co. v. McLellan*, 21 Can. Sup. 288.

7. *Creed v. Sun Fire Office*, 101 Ala. 522, 14 So. Rep. 323, 23 Ins. L. J. 461.

8. *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406.

9. *Bohm Mfg. Co. v. Sawyer*, 169 Mass. 477, 48 N. E. Rep. 620; *Reed v. Williamsburg City Ins. Co.*, 74 Me. 537; *Holbrook v. St. Paul Ins. Co.*, 25 Minn. 229; *Little v. Phoenix Ins. Co.*, 123 Mass. 380. And see *Planters' Ins. Co. v. Lloyd*, 71 Ark. 292, 75 S. W. Rep. 725.

10. *Doyle v. American Ins. Co.*, 181 Mass. 139, 63 N. E. Rep. 394; *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 16 Ins. L. J. 330; *Insurance Co. v. Drake*, 2 B. Mon. 47 (Ky.); *Harris v. York Ins. Co.*, 50 Pa. St. 341; *Caldwell v. Stadacona Ins. Co.*, 11 Duval, 212 (Can. Sup.). But see *Clark v. Dwelling-House Ins. Co.*, 81 Me. 373, 17 Atl. Rep. 303.

11. *Hayes v. Milford Ins. Co.*, 170 Mass. 492, 49 N. E. Rep. 754, 27 Ins. L. J. 459.

12. *Forester v. Gill*, 11 Colo. App. 410, 53 Pac. Rep. 230.

13. *Schaeffer v. Anchor Ins. Co.*, 113 Iowa, 652, 85 N. W. Rep. 985.

14. *Jacobs v. Mutual Ins. Co.*, 52 S. C. 110, 29 S. E. Rep. 533, 27 Ins. L. J. 715. And see *Horsch v. Dwelling-House Ins. Co.*, 77 Wis. 4, 45 N. W. Rep. 945, 19 Ins. L. J. 993.

That husband may have insurable interest in both the personal and real estate of his wife, see also *Barraciff v. Trade Ins. Co.*, 45 N. J. L. 543, 13 Ins. L. J. 190.

15. *Graham v. American Ins. Co.*, 48 S. C. 195, 26 S. E. Rep. 323, 26 Ins. L. J. 744.

16. *Minnesota, St. Paul & M. R. Co. v. Home Ins. Co.*, 64 Minn. 61, 66 N. W. Rep. 132, 25 Ins. L. J. 252; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. Rep. 365, 19 Ins. L. J. 385.

17. *Mutual Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. Rep. 209.

18. *Southern Mutual Ins. Co. v. Turnley*, 100 Ga. 298, 27 S. E. Rep. 975, 27 Ins. L. J. 57.

19. *Hamilton v. Dwelling-House Ins. Co.*, 98 Mich. 535, 57 N. W. Rep. 735, 23 Ins. L. J. 339.

20. *Guiterman v. German-Amer. Ins. Co.*, 111 Mich. 626, 70 N. W. Rep. 135, 26 Ins. L. J. 727.

21. *Royal Ins. Co. v. Stinson*, 103 U. S. 25, 10 Ins. L. J. 687; *Commercial Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 16 Ins. L. J. 81.

22. *Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. Rep. 87.

23. *Abbott v. Hampden Ins. Co.*, 30 Me. 414.

24. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

25. *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47.

A husband's right to use and possession of his wife's property sufficient.

Continental Fire Assoc. v. Wingfield, 32 Tex. Civ. App. 194, 73 S. W. Rep. 847.

26. *McLean v. Hess*, 106 Ind. 555, 16 Ins. L. J. 227.

27. *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. Rep. 729.

28. *Travis v. Continental Ins. Co.*, 32 Mo. App. 198.

29. *Voisin v. Commercial Ins. Co.*, 62 Hun, 4, 16 N. Y. Supp. 410; *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504 (U. S.); *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Oakman v. Dorchester Ins. Co.*, 98 Mass. 57; *Converse v. Citizens' Ins. Co.*, 10 Cush. 37 (Mass.).

30. *Philadelphia Tool Co. v. British Amer. Assur. Co.*, 132 Pa. St. 236, 19 Atl. Rep. 77; *Hand v. Williamsburg City Ins. Co.*, 57 N. Y. 41; *Lawrence v. St. Marks Ins. Co.*, 43 Barb. 479; *Niblo v. North American Ins. Co.*, 1 Sandf. 551.

31. *Imperial Ins. Co. v. Murray*, 73 Pa. St. 13.

32. *Mayor v. Exchange Ins. Co.*, 9 Bosw. 424 (N. Y.); *Mayor v. Brooklyn Ins. Co.*, 41 Barb. 231, aff'd, 4 Keyes, 465.

33. *Ætna Ins. Co. v. Miers*, 5 Sneed, 139 (Tenn.).

34. *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25 (U. S.); *Gilman v. Dwelling-House Ins. Co.*, 81 Me. 488, 17 Atl. Rep. 544.

35. *Morrison v. Tennessee Ins. Co.*, 18 Mo. 262; *Hill v. Cumberland Valley Co.*, 59 Pa. St. 474; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421; *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354; *Walsh v. Philadelphia Fire Assoc.*, 127 Mass. 383.

36. *Insurance Co. v. Stinson*, 13 Otto, 25 (U. S.); *Stout v. City Ins. Co.*, 12 Iowa, 371; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364; *Carter v. Humboldt Ins. Co.*, 12 Iowa, 287; *Franklin Ins. Co. v. Coates*, 14 Md. 285; *Protection Ins. Co. v. Hall*, 15 B. Mon. 411 (Ky.).

37. *Parks v. Hartford Ins. Co.*, 100 Mo. 373, 12 S. W. Rep. 1058, 19 Ins. L. J. 364; *Buck v. Phoenix Ins. Co.*, 76 Me. 586, 14 Ins. L. J. 412; *Mix v. Andes Ins. Co.*, 9 Hun, 397, rev'd, but on other points, 74 N. Y. 53; *Davis v. Quincy Ins. Co.*, 10 Allen, 113 (Mass.); *Kellar v. Merchants' Ins. Co.*, 7 La. Ann. 29.

38. *Insurance Co. v. Stinson*, 13 Otto, 25 (U. S.).

39. *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665; *Stephens v. Illinois Ins. Co.*, 43 Ill. 327; *Buffalo Steam Engine Works v. Sun Ins. Co.*, 17 N. Y. 401; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40 (Mass.); *Essex Savings Bank v. Meriden Ins. Co.*, 57 Conn. 335, 17 Atl. Rep. 930.

40. *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368, 12 Ins. L. J. 817; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Herkimer v. Rice*, 27 N. Y. 163.

41. *Sheppard v. Peabody Ins. Co.*, *supra*; *Herkimer v. Rice*, *supra*.

42. *Niblo v. North American Ins. Co.*, 1 Sandf. 551 (N. Y.).

43. *Pratt v. Atlantic & St. Lawrence R. Co.*, 42 Me. 579.

44. *White v. Madison*, 26 N. Y. 117.

45. *Insurance Co. v. Chase*, 5 Wall. 509 (U. S.).

46. *People v. Liverpool, L. & G. Ins. Co.*, 2 T. & C. 268 (N. Y.).

47. *Cone v. Niagara Ins. Co.*, 60 N. Y. 619.

48. *Insurance Co. v. Thompson*, 5 Otto, 547 (U. S.).

49. *Richmond v. Niagara Ins. Co.*, 79 N. Y. 230; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 218, 15 S. E. Rep. 562.

50. *David v. Williamsburg City Ins. Co.*, 83 N. Y. 265.

51. *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608, 10 Ins. L. J. 370.

52. *Sibley v. Prescott Ins. Co.*, 57 Mich. 14, 14 Ins. L. J. 770.

53. *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535, 13 N. E. Rep. 337.

54. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. Rep. 365, 19 Ins. L. J. 385.

55. *Reynolds v. Iowa Ins. Co.*, 80 Iowa, 563, 46 N. W. Rep. 659.

56. *Planters' Ins. Co. v. Thurston*, 93 Ala. 255, 9 So. Rep. 268, 20 Ins. L. J. 746.

57. *Western & A. Pipe Lines Co. v. Home Ins. Co.*, 145 Pa. St. 346, 22 Atl. Rep. 665, 21 Ins. L. J. 24.

58. *Cross v. National Ins. Co.*, 132 N. Y. 133, 30 N. E. Rep. 390; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254, 21 Ins. L. J. 455.

59. *Kinsman v. China Ins. Co.*, 49 Fed. Rep. 876.

60. *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298, 31 N. E. Rep. 1015, 22 Ins. L. J. 57; *Michigan F. & M. Ins. Co., v. Wieh*, 8 Colo. App. 409, 46 Pac. Rep. 687; *International Trust Co. v. Norwich Union Ins. Soc.*, 71 Fed. Rep. 81, 36 U. S. App. 277, 17 C. C. A. 608; *Insurance Co. N. A. v. International Trust Co.*, 71 Fed. Rep. 88, 36 U. S. App. 291, 17 C. C. A. 616.

RULE 9.

When no Insurable Interest.

A judgment creditor, whose judgment is a general lien only, has none in property of the debtor;¹ a lessee of farm bound by written agreement not to sell products without written consent of lessor; without such consent former cannot convey such interest in the products to another which will be insurable;² husband has none in his wife's separate property;³ vendor after absolute conveyance, though in possession, has none in the land;⁴ insurable interest of shipping brokers does not extend to commission for procuring charter;⁵ a turnpike company which has contributed to expense of building a county bridge, no insurable interest therein for that reason;⁶ a person has no insurable interest when his only right arises under a void or unenforceable contract either at law or in equity.⁷

1. *Grevemeyer v. Southern Ins. Co.*, 62 Pa. St. 340. But see otherwise when judgment a lien, *Spare v. Home Mutual Ins. Co.*, 17 Fed. Rep. 568, 12 Ins. L. J. 365.

2. *Heald v. Builders' Ins. Co.*, 111 Mass. 38.
3. *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. Rep. 428; *Planters' Ins. Co. v. Lloyd*, 71 Ark. 292, 75 S. W. Rep. 725.
 Mere loss of a home not sufficient.
Tyree v. Virginia F. & M. Ins. Co., W. Va. , 46 S. E. Rep. 706.
 May be otherwise under a statute.
Clark v. Firemen's Ins. Co., 18 La. 431.
4. *Balow v. Teutonia Farmers' Ins. Co.*, 77 Mich. 540, 43 N. W. Rep. 924, 19 Ins. L. J. 231.
5. *Phoenix Ins. Co. v. Parsons*, 129 N. Y. 86, 29 N. E. Rep. 87.
6. *Farmers' Ins. Co. v. New Holland Turnpike Co.*, 122 Pa. St. 37, 15 Atl. Rep. 563.
7. *Pope v. Glens Falls Ins. Co.*, 136 Ala. 670, 34 So. Rep. 29.

TITLE II.

Statement of Interest.

- RULE**
1. As imposed by contract.
 2. Good faith required — Effect of misstatement as to title.
 3. Construction of language in policy applicable to interest — Parol evidence.
 4. Construction of word “insured.”
 5. Application of the word “property.”
 6. Effect of making loss payable to third party — Policy issued to two jointly.
 7. Effect of mortgages, judgments, or liens — No inquiries.
 8. True statement in application sufficient.
 9. Company put upon inquiry by ambiguous answer in written application.
 10. Issue of policy without application or representation.
 11. When insured may state property to be “his.”
 12. Individual doing business in firm or corporate name — Void court order — Property held by third party as security.
 13. Tenant or created by lease — Executory contract.
 14. Estoppel by issue of policy with knowledge of facts.
 15. Estoppel in conduct of company's soliciting agent.

RULE 1.

As Imposed by Contract.

This entire policy shall be void, if the interest of the insured in the property be not truly stated herein.

This rule is imposed by above terms in the standard form of policy prescribed in :

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form of policy prescribed in :

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain above provision.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

RULE 2.

Good Faith Required — Effect of Misstatement as to Title.

An insurance company has the right to know the real owner of the property insured, and the extent of his insurable interest, and the contract of insurance is one in which the utmost good faith is required of the insured. A misrepresentation as to title in statement is material, and constitutes a breach of warranty as well.

Pelican Ins. Co. *v.* Smith, 92 Ala. 428, 9 So. Rep. 327; subsequent appeal, 107 Ala. 313, 18 So. Rep. 105.

* See note to "Concealment," Rule 1, page 2.

RULE 3.

**Construction of Language in Policy Applicable to Interest —
Parol Evidence.**

If the insurance company issues the policy with words of general description as applicable to interest or interests insured, or words which are uncertain or ambiguous, showing or indicating an intention to include or cover more than one interest or several interests, the courts will construe them in the most comprehensive sense that will give validity to the policy or avoid a forfeiture on the ground that interest is not truly stated;¹ and so when the language indicates that the interest is or may be a qualified one or not an absolute one, it will be regarded as sufficient in absence of specific inquiry,² or as a waiver of a more specific statement of interest;³ if words are ambiguous or uncertain in application, parol evidence is admissible to show extent of interest or interests intended,⁴ but otherwise when the terms of the policy are unambiguous.⁵

1. *Weed v. Hamburg-Bremen Ins. Co.*, 133 N. Y. 394, 31 N. E. Rep. 231, 21 Ins. L. J. 577. And see *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377; *Peck v. New London Ins. Co.*, 22 Conn. 575.

2. *Fowle v. Springfield F. & M. Ins. Co.*, 122 Mass. 191; *De Wolf v. Capital City Ins. Co.*, 16 Hun, 116 (N. Y.). And see *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553.

3. *De Wolf v. Capital City Ins. Co.*, *supra*.

4. *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Lee v. Adsit*, 37 N. Y. 78; *Franklin Ins. Co. v. Drake*, 2 B. Mon. 47 (Ky.). And see *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

5. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 14 S. W. Rep. 317.

RULE 4.**Construction of Word "Insured."**

The word "insured" may be construed in the sense in which it was understood by the immediate parties to the contract, whereby the insurance was effected.

Liverpool, L. & G. Ins. Co. v. Davis, 56 Nebr. 684, 77 N. W. Rep. 66.

RULE 5.**Application of the Word "Property."**

When the policy requires the interest of the insured in the property to be truly stated therein, the word "property" is not limited in its application to either real or personal, but applies to both.

Girard Ins. Co. v. Hebard, 95 Pa. St. 45.

RULE 6.**Effect of Making Loss Payable to Third Party — Policy Issued to Two Jointly.**

Inserting a clause in a policy making loss, if any, payable to a third party as interest may appear, does not establish notice to or knowledge of the company as to title or interest of the insured, who is not thereby relieved of the necessity of making a true statement of his interest;¹ but when the policy, instead of making the loss payable to a third party, directly insures by name several parties "as interest may appear," it operates either as a sufficient statement or as a waiver of a more specific statement,² and so when policy is issued to two persons jointly the fact that their interests may be as between them several and distinct is

no ground of objection to validity of the policy for insufficient statement of interest.³

1. *Lasher v. St. Joseph Ins. Co.*, 86 N. Y. 423, 10 Ins. L. J. 845; *Lasher v. Northwestern Ins. Co.*, 18 Hun, 104.

2. *Dakin v. Liverpool, L. & G. Ins. Co.*, 77 N. Y. 600; *De Wolf v. Capital City Ins. Co.*, 16 Hun, 116.

3. *Castner v. Farmers' Ins. Co.*, 46 Mich. 15, 10 Ins. L. J. 458. And see *Kausal v. Minnesota Ins. Co.*, 31 Minn. 17, 12 Ins. L. J. 657.

RULE 7.

Effect of Mortgages, Judgments, or Liens — No Inquiries.

Mortgages, judgments, or liens do not invalidate the insurance in absence of showing made by the insurance company that a particular statement of interest had been required of the insured, and he had made fraudulent concealment or misrepresentation of such interest. Unless true ownership or interest in the property is required by the conditions of the policy to be specifically and particularly and accurately set forth, it will be in general sufficient if the assured has an interest under any status of ownership or possession, in cases where no inquiries are made at the time the application is presented or the policy executed. The usual printed condition does not require ownership or interest in the property insured to be specifically and particularly set forth.

McClelland v. Greenwich Ins. Co., 107 La. 124, 31 So. Rep. 691, quoting and citing *Adema v. Insurance Co.*, 36 La. Ann. 660. And see *Light v. Insurance Co.*, 105 Tenn. 480, 58 S. W. 851; *De Armand v. Insurance Co.*, 28 Fed. Rep. 603, 17 Ins. L. J. 634; *Vogel v. People's Ins. Co.*, 9 Gray, 23 (Mass.).

RULE 8.**True Statement in Application Sufficient.**

If an application in writing, made part of the policy, contains a true statement as to interest or title, it is sufficient.

Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238, 16 Ins. L. J. 123.

RULE 9.**Company Put upon Inquiry by Ambiguous Answer in Written Application.**

When the company is put upon inquiry by an incomplete, ambiguous, or uncertain answer relating to title in a written application, and issues a policy without further inquiry, it may be assumed that it intended to insure whatever insurable interest the applicant had in the entire premises.

Clawson v. Citizens' Ins. Co., 121 Mich. 591, 80 N. W. Rep. 573.

RULE 10.**Issue of Policy Without Application or Representation.**

If an insurance company elects to issue its policy of insurance against a loss by fire without any application, or without any representation in regard to the title to the property to be insured, it cannot complain, after a loss has ensued that the interest of the insured was not correctly stated in the policy.

Cleavenger v. Franklin Ins. Co., 47 W. Va. 595, 35 S. E. Rep. 998; *Wolpert v. Northern Assur. Co.*, 44 W. Va. 734, 29 S. E. Rep. 1024; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. Rep. 393, 25 Ins. L. J. 529. And see *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 23 So. Rep. 183.

RULE II.

When Insured May State Property to be "His."

In the absence of specific inquiry by the insurance company, the interest of the insured in the property described in the policy as "his" is not necessarily rendered untrue by the mere fact that it is a qualified interest or of an equitable character;¹ but this does not relieve the insured if the interest is other than unconditional and sole ownership;² nor does the insured truly state his interest as "his property" when in fact he is only a part owner or owns only a part;³ the existence of an insurable interest does not of itself relieve the insured of the necessity of making a true statement of it.⁴ And when insured is in possession under an executory or conditional contract for sale of personal property, title to be in vendor until paid for, he cannot truly state property to be "his."⁵ Nor can a husband insure his wife's property as "his."⁶

1. *Walsh v. Philadelphia Fire Assoc.*, 127 Mass. 383; *Sussex County Ins. Co. v. Woodruff*, 2 Dutch. 541 (N. J.); *Southern Ins. Co. v. Lewis*, 42 Ga. 587; *Western Ins. Co. v. Mason*, 5 Bradw. 141 (Ill.); *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418, 10 Ins. L. J. 606; *Irving v. Excelsior Ins. Co.*, 1 Bosw. 507 (N. Y.); *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. 275 (N. Y.); *Farmers' Ins. Co. v. Fogelman*, 35 Mich. 481; *Williams v. Buffalo German Ins. Co.*, 17 Fed. Rep. 63, 12 Ins. L. J. 374. And see *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123; *De Armand v. Home Ins. Co.*, 28 Fed. Rep. 603, 17 Ins. L. J. 634; *East Texas Ins. Co. v. Crawford*, 16 S. W. Rep. 1068, 21 Ins. L. J. 39 (Tex.); *Buck v. Phoenix Ins. Co.*, 76 Me. 586, 14 Ins. L. J. 412.

2. *Mers v. Franklin Ins. Co.*, 68 Mo. 127, 8 Ins. L. J. 505; *Lasher v. St. Joseph Ins. Co.*, 86 N. Y. 423, 10 Ins. L. J. 845; *Brown v. Commercial Ins. Co.*, 86 Ala. 189. And see Title 3 this chapter, "Interest other than unconditional and sole ownership."

3. *Wilbur v. Bowditch Ins. Co.*, 10 Cush. 446 (Mass.); *Catron v. Tennessee Ins. Co.*, 6 Humphr. 176 (Tenn.). And see *Columbia Ins. Co. v. Lawrence*, 2 Pet. 25 (U. S.); *Keefer v. Phoenix Ins. Co.*, 26 Ont. App. Rep. 277, rev'g 29 Ont. 394; *German-American Ins. Co. v. Paul*, 53 S. W. Rep. 442 (Ind. Ter.).

4. *Lasher v. St. Joseph Ins. Co.*, 86 N. Y. 423, 10 Ins. L. J. 845.

5. *Lasher v. St. Joseph Ins. Co.*, *supra*; *Lasher v. Northwestern Ins. Co.*, 18 Hun, 98.

6. *Diffenbaugh v. Union Ins. Co.*, 150 Pa. St. 270. And see *Solmes v. Rutgers Ins. Co.*, 3 Keyes, 416 (N. Y.).

Some of the earlier forms of policies contained a specific condition requiring the insured to "state whether any other person had an interest in the insured property, and if so, its nature."

See *Agricultural Ins. Co. v. Montague*, 38 Mich. 548.

RULE 12.

Individual Doing Business in Firm or Corporate Name — Void Court Order — Property Held by Third Party as Security.

An individual may do business in a firm or corporate name and obtain insurance in such name, in absence of misrepresentation as to title, interest, or ownership, or as to who compose the firm, or specific inquiry;¹ statement of interest is not affected by a void court order opening a foreclosure decree under which the assured had obtained title;² leaving goods with auctioneer from whom purchased for purpose of sale, with agreement as to application of proceeds and retention as security for advances, does not require specific statement of interest in policy.³

1. *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. Rep. 235; *Delaware Ins. Co. v. Bonnet*, 20 Tex. Civ. App. 107, 48 S. W. Rep. 1104. And see *Bonnet v. Merchants' Ins. Co.*, 48 S. W. Rep. 1110; *Irving v. Excelsior Ins. Co.*, 1 Bosw. 507 (N. Y.); *Clark v. German Ins. Co.*, 7 Mo. App. 77. And see *Gould v. York County Ins. Co.*, 47 Me.

403; *Bon Aqua Imp. Co. v. Standard Ins. Co.*, 34 W. Va. 764, 12 S. E. Rep. 771.

2. *Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. Rep. 7.

3. *Franklin Ins. Co. v. Vaughan*, 2 Otto, 516 (U. S.).

RULE 13.

Tenant or Created by Lease — Executory Contract.

When the interest of insured is the creation of a lease or an executory contract by the owner it should be stated.

Brown v. Commercial Ins. Co., 86 Ala. 189; *Allen v. Sun Mutual Ins. Co.*, 36 La. Ann. 767, 14 Ins. L. J. 575.

RULE 14.

Estoppel by Issue of Policy With Knowledge of Facts.

Issue of policy by company's agent, with knowledge of facts as to interest or title, waives provision in policy requiring that it shall be truly stated, or operates as an estoppel;¹ but it must appear that the agent knew the facts; it is not enough that he was put upon inquiry.²

1. *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 680, 24 Ins. L. J. 161; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. Rep. 1078; *Wagner v. Westchester Ins. Co.*, 92 Tex. 549, 50 S. W. Rep. 569; *Mers v. Franklin Ins. Co.*, 68 Mo. 127, 8 Ins. L. J. 505; *Emery v. Piscataqua Ins. Co.*, 52 Me. 322; *Leach v. Republic Ins. Co.*, 58 N. H. 245; *Peck v. New London Ins. Co.*, 22 Conn. 575; *Ayres v. Home Ins. Co.*, 21 Iowa, 185; *Gates v. Penn Ins. Co.*, 10 Hun, 489 (N. Y.); *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 450; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. Rep. 365, 19 Ins. L. J. 385; *Deitz v. Providence-Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. Rep. 616. And see *Burke v. Niagara Ins. Co.*, 12 N. Y. Supp. 254, 58 Hun, 605, not reported; *German Ins. Co. v. Miller*, 39 Ill. App. 633.

2. *Bell v. Lycoming Ins. Co.*, 19 Hun, 238 (N. Y.). But see and compare *Skinner v. Norman*, 165 N. Y. 565, 59 N. E. Rep. 309; *Fame Ins. Co. v. Mann*, 4 Bradw. 485 (Ill. App.).

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 19.

RULE 15.

Estoppel in Conduct of Company's Soliciting Agent.

The condition of the policy in regard to statement of the interest of the assured, and requiring such interest to be sole and unconditional, may be waived, not only by express agreement, but by the conduct of the soliciting agent of the company who solicits the insurance; the errors or mistakes or misstatements of such soliciting agent are chargeable to the company which issues the policy upon the theory of an estoppel, and the company will be held to have contracted to insure such interest as the assured actually had without regard to the provisions in the policy in reference to the title.

Miotke v. Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 26 Ins. L. J. 910, 71 N. W. Rep. 463; *Dwelling-House Ins. Co. v. Dowdall*, 55 Ill. App. 623, aff'd, 159 Ill. 179, 42 N. E. Rep. 606; *Wich v. Equitable Ins. Co.*, 2 Colo. App. 484, 31 Pac. Rep. 389; *Combs v. Hannibal Ins. Co.*, 43 Mo. 148; *Hough v. City Ins. Co.*, 29 Conn. 10.

And see this volume, title "Agents."

TITLE III.

Interest other than Unconditional and Sole Ownership.

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- RULE 33. Pleading — Evidence — Burden of proof — Question of fact.
34. Contract severable.
35. When insured sole and unconditional owner — Illustrative cases.
36. When the insured is not sole and unconditional owner — Illustrative cases.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island,
New Jersey,	Wisconsin.

The standard form prescribed in Michigan is the same, except there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.”

The standard form of policy prescribed in

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain above provision.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

* See note to “Concealment,” Rule 1, page 2.

Section 3643 of the Ohio Revised Statutes providing "that any company insuring a building, shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made and the insurable value thereof to be fixed by such agent; and that in the absence of any change increasing the risk without the consent of the company, and also an intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal shall be paid" has no application to defenses founded upon specific conditions as to title but is limited in operation to a building itself, its condition and situation as regards surrounding objects and its value; and the word "change" must be confined in its reference to the same and to those matters which were open to the sight and observation of the agent.

Webster v. Dwelling-House Ins. Co., 53 Ohio St. 558, 7 Ohio C. C. 511.

RULE 2.

Breach of Condition Forfeits Insurance — Effect of Written Description — Evidence.

Where the policy contains a provision that the insured is the unconditional and sole owner of the property, and it turns out the insured was not the unconditional and sole owner, no recovery can be had, unless it appears there was a waiver or an estoppel, by which the insurance company is precluded from relying on the contract; or there is some language in the description indicating an intention to cover or include other interests than that specifically named;¹ and it is error to exclude statements or admissions of the insured made prior to the fire relevant to an issue in reference to his ownership or title.²

1. *Hebner v. Palatine Ins. Co.*, 157 Ill. 144, N. E. Rep. , aff'g 55 Ill. App. 275; *Overton v. American Central Ins. Co.*, 79 Mo. App. 1; *Barnard v. National Ins. Co.*, 27 Mo. App. 26; *Grigsby v. German Ins. Co.*, 40 Mo. App. 276; *Fire Assoc. v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. Rep. 153; *Breedlove v. Norwich Union Ins. Soc.*, 124 Cal. 164, 56 Pac.

Rep. 770, 28 Ins. L. J. 447; *McCormick v. Orient Ins. Co.*, 86 Cal. 260; *Tyree v. Virginia F. & M. Ins. Co.*, W. Va. , 46 S. E. Rep. 706. See Rule 3.

2. *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. Rep. 425, 24 Ins. L. J. 47.

RULE 3.

Otherwise Provided by Written Description.

When the written or descriptive part of the policy shows an intention to cover and protect other interests besides that of an individual or party specifically named, the condition requiring sole and absolute ownership is inoperative, because it is otherwise provided;¹ so where the written description shows intent to insure a qualified interest or one less or other than unconditional sole ownership,² or making loss payable to a third party with additional words showing nature of interest, such as making payable to him as a trustee.³

1. *Hagan v. Scottish Ins. Co.*, 186 U. S. 423, 22 Sup. Ct. Rep. 862, rev'g 102 Fed. Rep. 919, 43 C. C. A. 55; *Liverpool, L. & G. Ins. Co. v. McNeill*, 89 Fed. Rep. 131, 59 U. S. App. 499; *Mark v. National Ins. Co.*, 24 Hun, 565, aff'd, 91 N. Y. 663, on opinion below; *Sullivan v. Spring Garden Ins. Co.*, 34 App. Div. 128, 54 N. Y. Supp. 629; *West Branch Lumbermen's Exchange v. American Ins. Co.*, 183 Pa. St. 366. And see *Weed v. Hamburg-Bremen Ins. Co.*, 133 N. Y. 394, 31 N. E. Rep. 231.

And see Vol. 1, *Fire Insurance as a Valid Contract*, chapter "Parties to the Fire Insurance Contract."

2. *Creighton v. Homestead Ins. Co.*, 17 Hun, 78.

3. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53. And see *Lewis v. Council Bluffs Ins. Co.*, 63 Iowa, 193, 13 Ins. L. J. 557.

RULE 4.

An Insurable Interest no Answer to Breach of the Condition.

A person or party may have an insurable interest and yet not be sole and unconditional owner; if he is not such owner under the express condition in the pol-

icy it is no answer for the insured to claim or establish his insurable interest;¹ may be otherwise when the policy does not contain the condition as to sole ownership.²

1. *Hebner v. Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. Rep. 627, aff'g 55 Ill. App. 275; *Dwelling-House Ins. Co. v. Dowdall*, 49 Ill. App. 33; *Gettleman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. Rep. 627, 27 Ins. L. J. 160; *McCormick v. Springfield F. & M. Ins. Co.*, 66 Cal. 361, 14 Ins. L. J. 373. And see *Breedlove v. Norwich Union Soc.*, 124 Cal. 164, 56 Pac. Rep. 770, 28 Ins. L. J. 447.

2. *Farmers' Ins. Co. v. Lecroy*, 91 Ill. App. 41.

The contract of fire insurance is one of indemnity, personal to the insured, and does not extend to another person or interest without language in or on the policy consenting to the same, or covered or included in the description of the insured or the property.

See chapter on "Insurable Interest" in this volume, and Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to the Fire Insurance Contract," Rule 1, and note .

See also *Walker v. Phoenix Ins. Co.*, 89 Hun, 335, 35 N. Y. Supp. 374, rev'd, on a question of waiver, 156 N. Y. 628, 51 N. E. Rep. 392.

RULE 5.

Meaning of Unconditional and Sole Ownership — Construction.

Unconditional and sole ownership does not mean unconditional and sole ownership of the insurable interest of the insured; it means sole and unconditional ownership of the property in which the insurable interest may exist;¹ the conditions in the policy relating to ownership are to be construed not in their technical sense, but simply as requiring that the assured shall be the actual and substantial owner.²

1. *Hebner v. Palatine Ins. Co.*, 55 Ill. App. 275, 279, aff'd, 157 Ill. 144, 41 N. E. Rep. 627.

2. *Yost v. Dwelling-House Ins. Co.*, 179 Pa. St. 381, 35 Atl. Rep. 517, 26 Ins. L. J. 716; *Gaylord v. Lamar Ins. Co.*, 40 Mo. 13.

RULE 6.

When Ownership Sole and Unconditional.

An insured's ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition.

Steinmeyer v. Steinmeyer, 64 S. C. 413, 42 S. E. Rep. 184.

RULE 7.

Requisites of Unconditional and Sole.

To be "unconditional and sole" the interest must be completely vested in the insured, not conditional or contingent, nor for years, or for life only, nor in common, but of such a nature that the insured must sustain the entire loss if the property be destroyed; and this is so whether the title is legal or equitable.

Hartford Ins. Co. v. Keating, 86 Md. 130, 27 Ins. L. J. 406, 38 Atl. Rep. 29. And see *Hanover Ins. Co. v. Shrader*, 31 S. W. Rep. 1100 (Tex. Civ. App.).

RULE 8.

Test of Sole Unconditional Ownership.

A test of sole unconditional ownership is to inquire whether the interest, legal or equitable, as owner, is of such¹ a nature that the insured must sustain the entire loss if the property be destroyed;¹ another test is to inquire whether the interest is so vested in the individual that he can by no contingency be deprived of it without his own consent.²

1. *Stowell v. Clark*, 47 App. Div. 626, 62 N. Y. Supp. 155, aff'd, 171 N. Y. 673, on opinion below; *Hough v. City Ins. Co.*,

29 Conn. 20; *Dupreau v. Insurance Co.*, 76 Mich. 615; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Elliott v. Ashland Ins. Co.*, 117 Pa. St. 548, 554; *Cottingham v. Firemen's Fund Ins. Co.*, 90 Ky. 439; *Liverpool, L. & G. Ins. Co. v. Ricker*, 10 Tex. Civ. App. 264, 267; *Johannes v. Standard Ins. Co.*, 70 Wis. 196.

2. *Hough v. City Ins. Co.*, 29 Conn. 20; *Water Power Co. v. Street Ry. Co.*, 172 U. S. 491; *Clay Ins. Co. v. Huron Salt Co.*, 31 Mich. 346; *Lewis v. New England Ins. Co.*, 29 Fed. Rep. 497.

RULE 9.

Several Parties May Together be Sole and Unconditional Owner.

When the policy is issued to and in the names of several parties, and they together are the sole and unconditional owners, the fact that one has a less interest does not affect the insurance; such a condition is operative only when the united interest of those insured is less or other than sole and unconditional ownership.

Rankin v. Andes Ins. Co., 47 Vt. 144; *Perry v. Faneuil Hall Ins. Co.*, 11 Fed. Rep. 482, 11 Ins. L. J. 387.

RULE 10.

Clause Applies to Ownership when Policy Issues.

The clause as to unconditional and sole ownership applies to ownership at the date of issue of the policy, and cannot be made to apply to a condition caused by a subsequent sale.

Collins v. London Assur. Co., 165 Pa. St. 298, 30 Atl. Rep. 924, 24 Ins. L. J. 658; *Southern Cotton Oil Co. v. Prudential Fire Assoc.*, 78 Hun, 373, 29 N. Y. Supp. 128; *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674, 35 So. Rep. 309.

Under the old form of policy providing that "this policy shall become void, unless consent in writing is indorsed by the com-

pany hereon, in each of the following instances, viz., if insured is not the sole and unconditional owner, etc., etc., it was held that it related to *changes after* execution and acceptance of the policy, and did not apply to the existing state or condition at time the policy was issued, and could not be invoked to void the insurance when the insured at the time he applied for it was merely a vendee in possession under an executory contract of purchase.

Hall *v.* Niagara Fire Ins. Co., 93 Mich. 184, 53 N. W. Rep. 727.

RULE II.

When no Written Application and no Inquiry — Presumption.

Where there is no written application, and the assured has an insurable interest in the property, and in good faith applies for insurance upon the same, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest, and issues a policy to him, and accepts and retains his premium, the company is presumed to have knowledge of the condition of his title, and to insure the property with such knowledge; acceptance of policy does not amount to representation or warranty as to interest;¹ unless there is condition in the policy as to interest or title.²

1. Manchester Assur. Co. *v.* Abrams, 89 Fed. Rep. 932, 32 C. C. A. 426; Sharp *v.* Scottish Union Ins. Co., 136 Cal. 542, 69 Pac. Rep. 253, 615 (Chief Justice Beatty dissented in vigorous opinion, declaring the decision unwarranted and against decided weight of authority); German Ins. Co. *v.* Davis, 6 Kans. App. 268, 51 Pac. Rep. 60, 27 Ins. L. J. 315; Dooly *v.* Hanover Ins. Co., 16 Wash. 155, 47 Pac. Rep. 507; Hart *v.* Niagara Ins. Co., 9 Wash. 620, 38 Pac. Rep. 213, 27 L. R. A. 86; Slobodisky *v.* Phoenix Ins. Co., 53 Nebr. 816, 74 N. W. Rep. 270; Hanover Ins. Co. *v.* Bohn, 48 Nebr. 743, 67 N. W. Rep. 774, 25 Ins. L. J. 681; Farmers & Merchants' Ins. Co. *v.* Mickel, Nebr.

, 100 N. W. Rep. 130; *Hartford Ins. Co. v. McClain*, 85 S. W. Rep. 699 (Ky.); *Glens Falls Ins. Co. v. Michael*, Ind. , 74 N. E. Rep. 964. And see *Philadelphia Tool Co. v. British Amer. Assur. Co.*, 132 Pa. St. 236, 19 Atl. Rep. 77; *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *Scottish Union & Nat. Ins. Co. v. Strain*, 70 S. W. Rep. 274 (Ky.); *Continental Ins. Co. v. Gardner*, 62 S. W. Rep. 886 (Ky.); *Liverpool, L. & G. Ins. Co. v. Nations*, 24 Tex. Civ. App. 562, 59 S. W. Rep. 817; *German Ins. Co. v. Niewedde*, 11 Ind. App. 624, 39 N. E. Rep. 534.

2. *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 13 S. E. Rep. 77, 20 Ins. L. J. 481; *Liverpool, L. & G. Ins. Co. v. McGuire*, 52 Miss. 227. And see Rules 12, 13.

When the insurance is obtained upon a written application, and company omits, among other inquiries, to inquire as to interest or title, it may render the condition in the policy inoperative.

O'Neill v. Ottawa Ins. Co., 30 Up. Can. C. P. 151. And see *Butler v. Standard Ins. Co.*, 4 Tupper, 391 (Can. Ont. App.).

RULE 12.

**Insurance Company May Rely upon Conditions in the Policy —
Not Necessary to Make Inquiry as to Title.**

An applicant for insurance, who is not the unconditional sole owner of the property, and without disclosing the facts allows the company to assume or infer that he is such an owner, must see to it that the conditions as to title in the policy are complied with. It is not incumbent upon the insurance company to make an investigation or examination of title, as it may legally rely upon the clauses of the policy in regard thereto.

Schmid v. Virginia F. & M. Ins. Co., 37 S. W. Rep. 1013, aff'd, orally by Tennessee Supreme Court, 37 S. W. Rep. 1015; *Pelican Ins. Co. v. Smith*, 92 Ala. 428, 9 So. Rep. 327; subsequent appeal, 107 Ala. 313, 18 So. Rep. 105; *Overton v. American Central Ins. Co.*, 79 Mo. App. 1; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204; *Fire Assoc. v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. Rep. 153;

Syndicate Ins. Co. *v.* Bohn, 65 Fed. Rep. 165, 12 C. C. A. 531, 27 U. S. App. 564, 27 L. R. A. 614, 24 Ins. L. J. 408; *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674, 35 So. Rep. 309. And see *Crikelair v. Citizens' Ins. Co.*, 68 Ill. App. 637, *aff'd*, 168 Ill. 309, 48 N. E. Rep. 167; *West Rockingham Ins. Co. v. Sheets*, 26 Gratt. 854 (Va.).

RULE 13.

Effect of Acceptance of Policy by Insured — Not Affected by Omission to Make Inquiry.

In accepting a policy in his own name, without qualification or otherwise expressed, assured affirms that his interest in the property insured is unconditional sole ownership, and no other person has any interest in it. If this be not true, policy is void;¹ and the fact that the insurance company made no inquiry in regard to interest or title does not affect such result.²

1. *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. Rep. 959; *Syndicate Ins. Co. v. Bohn*, 65 Fed. Rep. 165, 12 C. C. A. 531, 27 U. S. App. 564, 27 L. R. A. 614, 24 Ins. L. J. 408; *Lasher v. St. Joseph Ins. Co.*, 86 N. Y. 423; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Overton v. American Central Ins. Co.*, 79 Mo. App. 1; *Brown v. Commercial Ins. Co.*, 86 Ala. 189, 192; *Adema v. Insurance Co.*, 36 La. Ann. 661, 664; *Orient Ins. Co. v. Williamson*, 98 Ga. 464, 25 S. E. Rep. 560.

2. *Orient Ins. Co. v. Williamson*, *supra*; *Syndicate Ins. Co. v. Bohn*, *supra*; *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358.

And see previous rules.

RULE 14.

When Company Put upon Inquiry by Ambiguous Answer in Written Application.

When the insurance company is put upon inquiry by an incomplete, ambiguous, or uncertain answer to

question in a written application in regard to title or interest, and issues a policy without further inquiry, it may be assumed that it intended to insure whatever insurable interest applicant had in the entire premises;¹ and so when the agent of the insurance company is put upon inquiry by a verbal notice or communication.²

1. *Clawson v. Citizens' Ins. Co.*, 121 Mich. 591, 80 N. W. Rep. 573.

2. *Weber v. Germania Ins. Co.*, 16 App. Div. 596.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 19.

RULE 15.

Distinction Between Interest and Title — Equitable Interest — Construction of Interest.

There is a distinction between interest and title. When policy provides that if insured's interest is not absolute, etc., policy shall be void, if the insured is the beneficial owner at the time policy was issued, the mere fact that the naked legal title is in another does not defeat a recovery of the insurance;¹ an equitable interest may amount to equitable ownership;² interest may be construed as synonymous with title.³

1. *McCoy v. Iowa State Ins. Co.*, 107 Iowa, 80, 28 Ins. L. J. 162, 77 N. W. Rep. 529. And see *Skinner Shipbuilding Co. v. Houghton*, 92 Md. 68, 48 Atl. Rep. 85; *Hough v. City Ins. Co.*, 29 Conn. 20; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 145; *Miller v. Alliance Ins. Co.*, 7 Fed. Rep. 649.

2. *Johannes v. Standard Ins. Co.*, 70 Wis. 196; *Pelton v. Westchester Ins. Co.*, 77 N. Y. 605; *Acer v. Merchants' Ins. Co.*, 57 Barb. 68; *Dohn v. Farmers' Ins. Co.*, 5 Lans. 275; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Franklin Ins. Co. v. Martin*, 40 N. J. L. 568; *Martin v. State Ins. Co.*, 44 N. J. L. 485; *Insurance Co. v. Haven*, 95 U. S. 242; *Mallery v. Frye*, 21 App. D. C. 105; *Lebanon Ins. Co. v. Erb*, 112 Pa. St. 149, 16 Ins.

L. J. 47; *Millville Ins. Co. v. Wilgus*, 88 Pa. St. 107; *Chandler v. Commerce Ins. Co.*, 88 Pa. St. 223; *Watertown Ins. Co. v. Simmons*, 96 Pa. St. 520, 9 Ins. L. J. 597; *Guest v. New Hampshire Ins. Co.*, 66 Mich. 98, 33 N. W. Rep. 31; *Hall v. Niagara Ins. Co.*, 93 Mich. 184, 53 N. W. Rep. 727; *Gaylord v. Lamar Ins. Co.*, 40 Mo. 13; *Franklin Ins. Co. v. Crockett*, 7 Lea, 725 (Tenn.); *Wainer v. Milford Ins. Co.*, 153 Mass. 335, 26 N. E. Rep. 877.

3. *Carrigan v. Insurance Co.*, 53 Vt. 429.

Many of the old forms read, "If the interest to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void." Such was the form in *Hough v. City Ins. Co.*, *supra*, wherein it was held that "absolute" meant "vested."

In *Washington Ins. Co. v. Kelly*, 32 Md. 421, the court had the same condition under consideration and said: * * * "the courts of most of the States have, however, held that the nature of the interest of the assured, in cases of ordinary contracts of insurance, not mutual, but made by a company insuring on its own account, is immaterial to the risk, and an omission to state the nature and extent of his interest where no inquiry has been made on the subject and it is not exacted by conditions, will not avoid the policy, unless failure so to state would operate as an actual fraud (2 Am. Lead. Cas. 638 to 642), and this must be now regarded as the settled law of this State. 14 Md. 298, 18 Md. 48, 20 Md. 36. In the present case there were no written proposals and no specific inquiry as to title or interest, and the general purpose and intent of inserting a clause like that under consideration very probably was to embody the law announced by the Supreme Court, by making it an express condition in the contract that his interest should be stated, where the assured held an interest of a special or limited nature; as, for instance, under a precarious title, dependent for its continuance upon events which might happen against his will, or over which he had no control. With this view of the law, and the origin and purpose of these clauses, the question is, does the particular language of the clause now before the court embrace a case where there is a mortgage on the insured property, of which the assured is otherwise the entire owner, and where his interest far exceeds all insurance thereon, as, by admitted facts of this case, clearly appears?

"Counsel for the appellant have argued that the words, 'or other interest not absolute' exclude the idea of an interest incumbered by mortgage where the legal title is in the mort-

gagee; that the term 'absolute' when applied to the ownership of an interest in property in its ordinary and common acceptation, means nothing less than an unincumbered fee-simple estate — the whole, clean, sound thing; that he who has property covered by mortgage, can, in no fair and just sense of the terms, be said to have an absolute interest therein. There is certainly much force in this argument, and it is no easy matter to give it a satisfactory answer. But, looking to the purpose of the clause considering the whole provision, the connection in which the term 'absolute' is used, and giving to the arguments on both sides, the best consideration of which I am capable, I have reached the conclusion that an interest such as the insured had, was not intended by the framers of it to be covered by this clause. It is due to counsel and to the cause, to state more at length, and in addition to what has been said, the reasons that have led me to this result.

"In the first place it is to be observed that it is not title but interest that is spoken of, and that 'leasehold interest' is used in immediate connection with the terms 'or other interest not absolute.' For every purpose of insurance, and fully within the reasoning of Chief Justice Marshall, a mortgagor, in possession and before foreclosure, has all that interest upon which underwriters usually rely for protection of the property. There is no reason why disclosure of the existence of the mortgage should have enhanced the premium, for the entire loss in case of fire must fall on the mortgagor, and his interest is pledged to every precaution to avoid the calamity insured against. The whole loss is his, and he still remains liable to the mortgagee for the full amount of the mortgage debt. The fire does not extinguish this debt and all the powerful persuasions of interest are just as much on the side of the insurer as if no mortgage existed. Mortgages are now universally regarded, in courts of equity, as mere securities for the payment of money. The mortgagor is still the substantial owner of the property. He can sell, convey, devise, or further incumber it, at pleasure, so long as the right of redemption exists. It may be taken for his debts under execution, and conveyances of it must be recorded under our registry laws. * * *

"But again, the term 'absolute' has no fixed, unvarying meaning. When used in connection with an interest in property it is not always synonymous with 'unqualified.' Used in connection with 'estate' it means an estate in lands not subject to, or defeasible upon any condition. 1 Burrill's Law Dict. 14. It may be quite as often and as pertinently used in contradistinction to 'contingent' or 'conditional,' as to 'qualified' or 'in-

cumbered.' That such is the sense in which it is here used is, I think, apparent from the tenor of the whole condition, and especially from the specification of a leasehold interest as one of those required to be stated. The immediately following words, 'or other interest not absolute,' are thus pointed to some other interest of like character with a leasehold, that is, some estate less than a fee or carved out of the fee simple, or determinable upon some condition, event, or contingency, as an estate for life, or *pur autre vie*, which, as well as a leasehold, come within the reasoning of the Supreme Court, as the loss may not fall upon their owners but upon the landlord, or remainderman, or reversioner; and hence the importance to the insurers of having them stated."

RULE 16.

Ownership of Property Described in General Words as a Class or Kind.

Insured may be the sole and unconditional owner of personal property described in general words as a class, like household furniture or stock of goods, though there may be other property of the same class belonging to some one else, for which no claim is made.

Liverpool, L. & G. Ins. Co. *v.* Nations, 24 Tex. Civ. App. 562, 59 S. W. Rep. 817. And see St. Paul F. & M. Ins. Co. *v.* Kelley, 43 Kans. 741, 23 Pac. Rep. 1046, 19 Ins. L. J. 618.

RULE 17.

Partnership Interests.

Where the title to real estate or building insured held by a partnership is in the firm and not in the individual members of it, the transfer of the interest of one of the members, before issue of the policy, has no effect upon the unconditional and sole ownership of the firm. An assignment by one partner of his share simply transfers any interest he may have in the sur-

plus remaining after payment of the firm debts and the settlement of the firm accounts. Whether the purchaser of such an interest takes anything whatever by the transfer cannot be known until all the partnership affairs have been settled and adjusted;¹ but when the title is in an individual member of the firm, and never conveyed or transferred to it, and the firm has only use of it, then it cannot be said to be the property of the firm.²

1. *Wood v. American Ins. Co.*, 149 N. Y. 382, 44 N. E. Rep. 80, aff'g 78 Hun, 109, 29 N. Y. Supp. 250.

2. *Citizens' Ins. Co. v. Doll*, 35 Md. 89.

RULE 18.

Admission of Third Party as a Partner.

If it is claimed that the insured is not the sole and unconditional owner, because there has been a third party made a partner, the inquiry is as to ownership as between the parties themselves, and if there is a positive agreement between them, that must govern; the question as to whether they are partners as to third persons or creditors does not arise;¹ an intention to form a partnership, or an agreement to create one, does not necessarily make a third party a joint owner of the goods used in the business, unless so understood and agreed,² as for instance the agreement may extend to division of profits only.³ An executory agreement to form a partnership does not affect ownership when such partnership is not in fact formed.⁴

1. *Pittsburg Ins. Co. v. Frazee*, 107 Pa. St. 521, 14 Ins. L. J. 512.

2. *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230.
3. *Boutelle v. Westchester Ins. Co.*, 51 Vt. 4.
4. *Pencil v. Home Ins. Co.*, 3 Wash. 485, 28 Pac. Rep. 1031.

RULE 19.

Policy on "Use and Occupancy" — Effect of Pooling Arrangement.

When the policy is in terms upon "use and occupancy" of a grain elevator plant, a pooling arrangement with other elevator properties for promotion of common interests and suppression of hostile competition does not affect the sole and unconditional ownership of such use and occupancy, when the effect of such arrangement is merely to provide for distribution of earnings placed in a common pool, the business of the elevator continuing under the control and direction of its proprietor, who employs his own employees and pays operating expenses, and makes his own contracts except as to price.

Michael v. Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. Rep. 810, aff'g 64 App. Div. 182, 71 N. Y. Supp. 918.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Amount of Loss or Damage," Rule 35.

RULE 20.

Deed Intended as a Mortgage — A Deed Must be Delivered — Effect of Recording.

The insured remains sole and unconditional owner, notwithstanding the execution and delivery of a deed, absolute upon its face, but shown by proper evidence to have been actually intended as a mortgage.¹ A deed must be delivered with intent to deliver; the recording

of it without the knowledge of the grantee is of no avail.²

1. *Sun Fire Office v. Clark*, 53 Ohio St. 414, 42 N. E. Rep. 248, 25 Ins. L. J. 333; *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. Rep. 490.

May be otherwise under Georgia Code. See *Phoenix Ins. Co. v. Asberry*, 95 Ga. 792, 22 S. E. Rep. 717.

2. *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. Rep. 188.

RULE 21.

Words Added to Deed After Execution May Present a Question of Fact as to Spoliation.

When the insurance company relies upon a deed to the insured containing the words "in trust for ———" to sustain its defense that the insured did not own the property in his own right, the insured is permitted to show that the words quoted were added to the deed after its execution and delivery, and without his knowledge or consent. The question is not one of reformation of the deed, but simply one of fact of spoliation, proper to be submitted to a jury.

Mix v. Royal Ins. Co., 169 Pa. St. 639, 32 Atl. Rep. 460.

RULE 22.

When Insured Sole and Unconditional Owner Though Title Defective — Equitable Interest.

So long as the insured, under claim of right, has the exclusive use and enjoyment of the property, without any assertion of an adverse right or interest by any other person, he may be regarded as sole unconditional owner, notwithstanding his title to the real estate upon which the insured building stands is de-

fective;¹ an equitable interest or ownership may be sole and unconditional.²

1. *Miller v. Alliance Ins. Co.*, 19 Blatchf. 308, 7 Fed. Rep. 649; *Williams v. Buffalo German Ins. Co.*, 17 Fed. Rep. 63, 12 Ins. L. J. 374.

2. *Mallery v. Frye*, 21 App. D. C. 105. And see Rules 5-8, 15.

RULE 23.

Instrument Creating Interest as Affected by Fraud.

The insurance company cannot claim that the interest or title of the insured created by a certain instrument is not insured because such instrument is fraudulent and void or obtained by his fraud.

Burson v. Philadelphia Fire Assoc., 136 Pa. St. 267, 20 Atl. Rep. 401, 20 Ins. L. J. 144; *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43.

RULE 24.

Mortgagee as Insured.

A mortgagee to whom the loss is payable, with mortgage clause inserted or attached, and really intended by the parties to be the person insured, may recover, notwithstanding the supposed owner and nominal insured has parted with title by quit-claim deed when the policy issued.

Liverpool, L. & G. Ins. Co. v. Davis, 56 Nebr. 684, 77 N. W. Rep. 66.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Mortgagor and Mortgagee."

RULE 25.

Effect of Liens or Incumbrances.

The condition as to unconditional sole ownership has reference only to the quality of the estate or in-

terest, does not necessarily refer to legal title, and a person or party may be an unconditional sole owner within meaning of the language of the policy, notwithstanding the existence of any kind of lien or incumbrance, whether by mortgage, lease, or otherwise;¹ so the existence of a deed of trust does not necessarily prevent the assured from being the sole owner, nor does it make the *cestui que trust* a joint owner.² This rule may not apply when, by special terms or language of the policy, it is made void if any other person than the insured has a *lien* on the property insured;³ or when a chattel mortgage conveys the title to the mortgagee.⁴

1. *Caplis v. American Ins. Co.*, 60 Minn. 376, 62 N. W. Rep. 440, 24 Ins. L. J. 551; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. Rep. 393, 25 Ins. L. J. 529; *Cleavenger v. Franklin Ins. Co.*, 47 W. Va. 595, 35 S. E. Rep. 998; *Hartford Ins. Co. v. Enoch*, Ark. , 77 S. W. Rep. 899; *Huff v. Jewett*, 20 Misc. 35, 44 N. Y. Supp. 311; *American Artistic Gold Co. v. Glens Falls Ins. Co.*, 1 Misc. 114; *Washington Ins. Co. v. Kelly*, 32 Md. 421; *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325; *Clay Ins. Co. v. Beck*, 43 Md. 358; *Friezen v. Allemania Ins. Co.*, 30 Fed. Rep. 352, 16 Ins. L. J. 513; *Ellis v. Insurance Co. N. A.*, 32 Fed. Rep. 646; *Dolliver v. St. Joseph Ins. Co.*, 128 Mass. 315; *Judge v. Connecticut Ins. Co.*, 132 Mass. 521, 11 Ins. L. J. 843. And see *Omaha Ins. Co. v. Thompson*, 50 Nebr. 580, 70 N. W. Rep. 30; *Boulware v. Farmers' Ins. Co.*, 77 Mo. App. 639; *Light v. Insurance Co.*, 105 Tenn. 480, 58 S. W. Rep. 851; *Temple v. Western Assur. Co.*, 35 N. B. 171; *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. Rep. 445; *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. Rep. 434; *Lycoming Ins. Co. v. Haven*, 95 U. S. 242, 7 Ins. L. J. 449; *Steinmeyer v. Steinmeyer*, 64 S. C. 413, 42 S. E. Rep. 184; *McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 So. Rep. 691; *Wolf v. Theresa Village Ins. Co.*, 115 Wis. 402, 91 N. W. Rep. 1014; *Hawley v. Liverpool, L. & G. Ins. Co.*, 102 Cal. 651, 36 Pac. Rep. 926, 23 Ins. L. J. 874; *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358;

Alamo Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. Rep. 126; Burlington Ins. Co. *v.* Coffman, 13 Tex. Civ. App. 439, 35 S. W. Rep. 406; Alamo Ins. Co. *v.* Brooks, 32 S. W. Rep. 714, Tex. Civ. App. ; Carrigan *v.* Insurance Co., 53 Vt. 418, 429, 10 Ins. L. J. 606; German Ins. Co. *v.* Gibe, 162 Ill. 251, 44 N. E. Rep. 490; Sun Fire Office *v.* Clark, 53 Ohio St. 414, 42 N. E. Rep. 248, 25 Ins. L. J. 333.

2. Wolpert *v.* Northern Assur. Co., 44 W. Va. 734, 29 S. E. Rep. 1024; Manhattan Ins. Co. *v.* Weil, 28 Gratt. 389 (Va.); Union Assur. Soc. *v.* Nalls, 101 Va. 613, 44 S. E. Rep. 896.

3. Martin *v.* Fidelity Ins. Co., 119 Iowa, 570, 93 N. W. Rep. 562. (The language of the policy was, "If any other person than the insured now has or shall hereafter acquire any interest in or *lien* on the property insured or any part thereof" it should be void, and it was therein conceded and held that a judgment lien was clearly within the meaning of the provision.)

4. Woodward *v.* Republic Ins. Co., 32 Hun, 365. But compare American Artistic Gold Co. *v.* Glens Falls Ins. Co., 1 Misc. 114; Hubbard *v.* Hartford Ins. Co., 33 Iowa, 325; Kronk *v.* Birmingham Ins. Co., 91 Pa. St. 300. And see Hunt *v.* Springfield F. & M. Ins. Co., 196 U. S. 47, 25 Sup. Ct. Rep. 179, aff'g 20 App. D. C. 48.

See "Chattel Mortgage."

Some of the old forms of policy required the title or interest in terms to be *unincumbered* and such clauses were usually held to be effective and the existence of a mortgage to be a violation of such a condition.

See Fitchburg Savings Bank *v.* Amazon Ins. Co., 125 Mass. 431; Warner *v.* Middlesex Assur. Co., 21 Conn. 444; Addison *v.* Kentucky Ins. Co., 7 B. Mon. 470 (Ky.); Beck *v.* Hibernia Ins. Co., 44 Md. 95; Hosford *v.* Germania Ins. Co., 127 U. S. 399; Continental Ins. Co. *v.* Vanlue, 126 Ind. 410, 26 N. E. Rep. 119. And see Georgia Home Ins. Co. *v.* Holmes, 75 Miss. 390, 23 So. Rep. 183.

So under the old forms containing the clause of warranty that the insured "has not omitted to state any information material to the risk" failure to disclose a mortgage was held to avoid the policy.

Westchester Ins. Co. *v.* Weaver, 70 Md. 536, 17 Atl. Rep. 401.

And see chapter on "Concealment."

A charge upon land created by a will was held to be an incumbrance within the meaning of a condition against incumbrances.

Renninger *v.* Dwelling-House Ins. Co., 168 Pa. St. 350, 31 Atl. Rep. 1083.

And so a vendor's lien was held to be an incumbrance.

Curlee v. Texas Home Ins. Co., 31 Tex. Civ. App. 471, 73 S. W. Rep. 831.

RULE 26.

Interest of Vendee Under an Executory Contract of Sale.

The interest of a vendee under an executory contract of sale, who is not in default, and is in possession under such contract, and is the owner in equity, may be regarded as unconditional sole ownership;¹ the vendor's lien does not prevent the vendee from being the sole and unconditional owner;² but mere possession by a vendee does not of itself necessarily make him the sole unconditional owner;³ a test is whether the entire loss falls upon him;⁴ when he is in default, though in possession, he is not sole and unconditional owner, specially when he has allowed the land to be sold for taxes;⁵ nor can a party in possession under a verbal gift and promise to convey be regarded as sole and unconditional owner.⁶

1. *Wolf v. Theresa Village Ins. Co.*, 115 Wis. 402, 405, 91 N. W. Rep. 1014; *Matthews v. Capital Ins. Co.*, 115 Wis. 272, 91 N. W. Rep. 675; *Carey v. Liverpool, L. & G. Ins. Co.*, 92 Wis. 538; *Johannes v. Standard Ins. Co.*, 70 Wis. 196, 35 N. W. Rep. 298; *Phoenix Ins. Co. v. Kerr*, 129 Fed. Rep. 723, 64 C. C. A. 251; *Pennsylvania Ins. Co. v. Hughes*, 108 Fed. Rep. 497, 47 C. C. A. 459; *Milwaukee Mechanics' Ins. Co. v. Rhea*, 123 Fed. Rep. 9, 60 C. C. A. 103; *Scottish Union & Nat. Ins. Co. v. Train*, 70 S. W. Rep. 274 (Ky.); *Stowell v. Clark*, 47 App. Div. 626, 62 N. Y. Supp. 155, aff'd, 171 N. Y. 673, on opinion below; *Pelton v. Westchester Ins. Co.*, 77 N. Y. 605; *Baker v. State Ins. Co.*, 31 Oreg. 41, 48 Pac. Rep. 699; *Wich v. Equitable Ins. Co.*, 2 Colo. App. 484, 31 Pac. Rep. 389; *Lewis v. New England Ins. Co.*, 29 Fed. Rep. 497; *Hamburg-Bremen Ins. Co. v. Ruddell*, Tex. Civ. App. , 82 S. W. Rep. 826; *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615, 43 N. W. Rep. 585; *Westchester Ins. Co. v. Weaver*, 70 Md. 536; *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460, 475; *Millville Ins. Co. v.*

Wilgus, 88 Pa. St. 107; *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328; *Hall v. Niagara Ins. Co.*, 93 Mich. 184, 53 N. W. Rep. 727. And see *Liberty Ins. Co. v. Boulden*, 96 Ala. 508, 11 So. Rep. 771, 22 Ins. L. J. 188.

2. *Liverpool, L. & G. Ins. Co. v. Ricker*, 10 Tex. Civ. App. 264, 31 S. W. Rep. 248; *Boulden v. Phoenix Ins. Co.*, 112 Ala. 422, 20 So. Rep. 587; *Insurance Co. v. Estes*, 106 Tenn. 472, 62 S. W. Rep. 149, 52 L. R. A. 915; *Manhattan Ins. Co. v. Barker*, 7 Heisk. 503 (Tenn.); *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362 (Va.); *Chatillon v. Canadian Ins. Co.*, 27 Up. Can. C. P. 450. But see and compare *Farmers' Ins. Co. v. Curry*, 13 Bush, 313 (Ky.); *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328.

3. *Hubbard v. North British & M. Ins. Co.*, 57 Mo. App. 1; *Harness v. National Ins. Co.*, 62 Mo. App. 245; *Mott v. Citizens' Ins. Co.*, 69 Hun, 501, 23 N. Y. Supp. 400; *Porter v. Ætna Ins. Co.*, 2 Flipp. 100, 6 Ins. L. J. 928 (U. S. Cir.).

4. *Phoenix Ins. Co. v. Kerr*, 129 Fed. Rep. 723, 64 C. C. A. 251. See Rule 8, and cases cited thereunder.

5. *Hinman v. Hartford Ins. Co.*, 36 Wis. 159.

6. *Wineland v. Security Ins. Co.*, 53 Md. 276.

RULE 27.

As Tested by Right to Enforce Specific Performance — Assumption of Loss.

If the facts show the insured to have been in a position to enforce specific performance, by which the entire title would be placed in him, or if he appears to have been the beneficial owner of the entire property, he may be regarded as sole and unconditional owner, within the meaning of the condition;¹ and so a vendee in possession under an executory contract of sale under which he assumes all loss from destruction of the property may be regarded as the unconditional and sole owner.²

1. *Fire Assoc. v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. Rep. 153.

2. *Stowell v. Clark*, 47 App. Div. 626, 62 N. Y. Supp. 155, aff'd, 171 N. Y. 673, on opinion below.

RULE 28.

Effect of Executory Contract on Ownership of Vendor.

An executory contract to sell unperformed, does not necessarily prevent the vendor from being sole and unconditional owner;¹ when the facts are such as to render the vendee a sole unconditional owner, it would seem to logically follow that the vendor is not such owner,² when there is nothing but naked legal title left in him, with an existing obligation by written contract to transfer it to the vendee in whom is the entire equitable interest or estate.³

1. *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. Rep. 261. See also and compare *Clay Ins. Co. v. Huron Salt Co.*, 31 Mich. 346.

2. *Hamilton v. Dwelling-House Ins. Co.*, 98 Mich. 535, 57 N. W. Rep. 735, 23 Ins. L. J. 339; *Rosenstock v. Mississippi Home Ins. Co.*, 82 Miss. 674, 35 So. Rep. 309. And see *Skinner Ship Building Co. v. Houghton*, 92 Md. 68, 48 Atl. Rep. 85. And see Rules 26, 27.

3. *Clay Ins. Co. v. Huron Mfg. Co.*, 31 Mich. 346.

RULE 29.

Effect of Option to Purchase.

The interest of an owner of property which another party holds under an option to purchase and irrevocable by the owner, but which the holder of the option is not bound to accept and is free to abandon, is sole and unconditional ownership, because the owner cannot compel the holder of the option to take the property or suffer the loss.

Phoenix Ins. Co. v. Kerr, 129 Fed. Rep. 723, 64 C. C. A. 251.

RULE 30.

Vendee of Personal Property Under Conditional Contract of Sale — Lessee of Personal Property.

When the insured holds personal property under a conditional contract of sale, title to be in the vendor, until purchase price is fully paid, and same is not paid, he cannot be said to be the sole and unconditional owner within the meaning of the policy;¹ when insured is in possession under a bill of sale, though given as a mortgage or security, and has possession after the debt has become due, he may be regarded as a sole and unconditional owner.² A person who leases personal property, though responsible for its loss, is not sole and unconditional owner.³

1. *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. Rep. 959; *Hartford Ins. Co. v. Enoch*, Ark. , 77 S. W. Rep. 899; *Ehrsam v. Phoenix Ins. Co.*, 43 Nebr. 554, 61 N. W. Rep. 722, 24 Ins. L. J. 316; *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245, 40 L. R. A. 358; *McWilliams v. Cascade Ins. Co.*, 7 Wash. 48; *Westchester Ins. Co. v. Weaver*, 70 Md. 536, 17 Atl. Rep. 401; *Lasher v. St. Joseph Ins. Co.*, 86 N. Y. 423; *Lasher v. Northwestern Ins. Co.*, 18 Hun, 98.

2. *Carey v. Liverpool, L. & G. Ins. Co.*, 92 Wis. 538, 66 N. W. Rep. 693, 25 Ins. L. J. 556. And see *Kronk v. Birmingham Ins. Co.*, 91 Pa. St. 300.

3. *Mt. Leonard Mills Co. v. Liverpool, L. & G. Ins. Co.*, 25 Mo. App. 259.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to Fire Insurance Contract."

RULE 31.

Waiver or Estoppel — Parol Evidence — Agents — Question of Fact — Company not Chargeable with Knowledge of Records.

Issue and delivery of a policy with knowledge of the company or its agent of existing facts as to the in-

terest or title of the insured, operates as a waiver or estoppel preventing the company from claiming a forfeiture by reason of such facts;¹ and the knowledge of an agent who is authorized by the insurance company to solicit and take the application for the insurance may be the knowledge of the company, operating as an estoppel,² specially when knowing the facts he makes misstatements in a written application he is authorized by the company to take,³ and so the company is estopped when, with knowledge of the facts, it indorses its consent to an assignment upon the policy;⁴ parol evidence is admissible to explain and give effect to the policy;⁵ renewal of the policy with knowledge of the facts as to interest or title or change therein may also operate as a waiver or estoppel;⁶ if agent is clothed by the insurance company with apparent authority, its scope and extent may be a question of fact proper to be determined by a jury;⁷ the company is not chargeable with knowledge of record titles;⁸ knowledge of fact when policy issues will not be inferred from an uncertain casual conversation with an agent two years before policy issues.⁹

1. *Brooks v. Erie Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748, aff'd, 177 N. Y. 572, 69 N. E. Rep. 1120, on opinion below; *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. Rep. 615, aff'g 66 Hun, 546, 21 N. Y. Supp. 664; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254, 21 Ins. L. J. 455; *Cross v. National Ins. Co.*, 132 N. Y. 133, 30 N. E. Rep. 390; *Brodhead v. Lycoming Ins. Co.*, 14 Hun, 452; *Miaghman v. Hartford Ins. Co.*, 24 Hun, 58; *Franklin v. Atlantic Ins. Co.*, 42 Mo. 456; *O'Brien v. Greenwich Ins. Co.*, 95 Mo. App. 301, 68 S. W. 976; *Clark v. Knoxville Ins. Co.*, 61 Mo. App. 181; *Deland v. Ætna Ins. Co.*, 68 Mo. App. 277; *Nute v. Hartford Ins. Co.*, Mo. App. , 83 S. W. Rep. 83; *Pope v. Glens Falls Ins. Co.*, 130 Ala. 356, 30 So. Rep. 496; *Brown v.*

Commercial Ins. Co., 86 Ala. 189; Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. Rep. 379; American Central Ins. Co. *v.* Donlon, 16 Colo. App. 416, 66 Pac. Rep. 249; Danvers Ins. Co. *v.* Schertz, 95 Ill. App. 656; Home Ins. Co. *v.* Mendenhall, 164 Ill. 458, 45 N. E. Rep. 1078; Rockford Ins. Co. *v.* Nelson, 75 Ill. 548; Andes Ins. Co. *v.* Fish, 71 Ill. 620; Germania Ins. Co. *v.* McKee, 94 Ill. 494; Allen *v.* Home Ins. Co., 133 Cal. 29, 65 Pac. Rep. 138; Strause *v.* Palatine Ins. Co., 128 N. C. 64, 38 S. E. Rep. 256; Cowell *v.* Phoenix Ins. Co., 126 N. C. 684, 36 S. E. Rep. 184; Clapp *v.* Farmers' Ins. Co., 126 N. C. 388, 35 S. E. Rep. 617; Grabbs *v.* Farmers' Ins. Co., 125 N. C. 389, 34 S. E. Rep. 503; Geninger *v.* North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. Rep. 773; Breedlove *v.* Norwich Union Soc., 124 Cal. 164, 56 Pac. Rep. 770, 28 Ins. L. J. 447; Rhode Island Underwriters' Assoc. *v.* Monarch, 98 Ky. 305, 17 Ky. L. Rep. 876, 25 Ins. L. J. 116, 32 S. W. Rep. 959; Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. Rep. 720; London & Lancashire Ins. Co. *v.* Gerteson, Ky. , 51 S. W. Rep. 617; Mutual Ins. Co. *v.* Hammond, 106 Ky. 386, 50 S. W. Rep. 545; Miotke *v.* Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. Rep. 463, 26 Ins. L. J. 910; Haire *v.* Ohio Farmers' Ins. Co., 93 Mich. 481, 22 Ins. L. J. 66, 53 N. W. Rep. 623; Hoose *v.* Prescott Ins. Co., 84 Mich. 309, 47 N. W. Rep. 587, 20 Ins. L. J. 506; Wagner *v.* Westchester Ins. Co., 92 Tex. 549, 50 S. W. Rep. 569; Liverpool, L. & G. Ins. Co. *v.* Ende, 65 Tex. 118; Queen Ins. Co. *v.* May, 43 S. W. Rep. 73 (Tex. Civ. App.); Continental Ins. Co. *v.* Cummings, Tex. , 81 S. W. Rep. 705; Graham *v.* American Ins. Co., 48 S. C. 195, 26 Ins. L. J. 744, 26 S. E. Rep. 323; King *v.* Cox, 63 Ark. 204, 37 S. W. Rep. 877; Caldwell *v.* Fire Assoc., 177 Pa. St. 492, 35 Atl. Rep. 612; Welsh *v.* London Assur. Co., 151 Pa. St. 607, 25 Atl. Rep. 142, 23 Ins. L. J. 94; Carey *v.* Home Ins. Co., 97 Iowa, 619, 66 N. W. Rep. 920; McMurray *v.* Capitol Ins. Co., 54 N. W. Rep. 354, 22 Ins. L. J. 204 (Iowa); Hartford Ins. Co. *v.* Keating, 86 Md. 130, 27 Ins. L. J. 406, 38 Atl. Rep. 29; Phoenix Ins. Co. *v.* Searles, 100 Ga. 97, 27 S. E. Rep. 779; Morotuck Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. Rep. 487; Manhattan Ins. Co. *v.* Weil, 28 Gratt. 389; Hartford Ins. Co. *v.* McCarthy, Kans. , 77 Pac. Rep. 90; Capitol Ins. Co. *v.* Bank of Pleasanton, 50 Kans. 449, 22 Ins. L. J. 361, 31 Pac. Rep. 1069; Rockford Ins. Co. *v.* Farmers' State Bank, 50 Kans. 427, 22 Ins. L. J. 389, 31 Pac. Rep. 1063; American Central Ins. Co. *v.* McLanathan, 11 Kans. 533; Long Island Ins. Co. *v.* Great Western Mfg. Co., 2 Kans. App. 377, 42 Pac. Rep. 738; Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kans. App. 225, 44 Pac. Rep.

35; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322; *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390, 23 So. Rep. 183; *Welch v. Fire Assoc.*, 120 Wis. 456, 98 N. W. Rep. 227.

2. *Ayres v. Phoenix Ins. Co.*, 66 Mo. App. 288; *Teutonia Ins. Co. v. Howell*, 54 S. W. Rep. 852 (Ky.); *State Ins. Co. v. Latour-ette*, Ark. , 74 S. W. Rep. 300; *Phoenix Ins. Co. v. Maxson*, 42 Ill. App. 164; *Continental Ins. Co. v. Ward*, 50 Kans. 346; *Born v. Home Ins. Co.*, 120 Iowa, 299, 94 N. Y. Rep. 849, 31 Pac. Rep. 1079, 22 Ins. L. J. 373; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. Rep. 767; *Reiner v. Dwelling-House Ins. Co.*, 74 Wis. 89, 42 N. W. Rep. 208 (while the decisions in the last two cases were made on construction of the Wisconsin statute, the question of the authority of an agent and its apparent scope, in absence of limitation brought to the notice or knowledge of the insured, may create a question of fact, in any case, where the insurance company has by its own act or conduct clothed him with authority, independent of any statute. See title "Agents."); *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 So. Rep. 48, 19 Ins. L. J. 961; *Burson v. Philadelphia Fire Assoc.*, 136 Pa. St. 267, 20 Atl. Rep. 401, 20 Ins. L. J. 144.

3. *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 So. Rep. 46, 24 Ins. L. J. 447; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. Rep. 417; *Mullin v. Vermont Ins. Co.*, 54 Vt. 223; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; *Key v. Des Moines Ins. Co.*, 77 Iowa, 174, 41 N. W. Rep. 614.

4. *Georgia Home Ins. Co. v. Leaverton*, 33 S. W. Rep. 579, Tex. Civ. App. .

5. *Milwaukee Mechanics' Ins. Co. v. Brown*, 3 Kans. App. 225, 44 Pac. Rep. 35.

6. *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665; *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 541, 46 S. E. Rep. 463.

7. *Hough v. City Ins. Co.*, 29 Conn. 10.

And see Vol. 1, *Fire Insurance as a Valid Contract*, chapter on "Waiver."

8. *Tyree v. Virginia F. & M. Ins. Co.*, W. Va. , 46 S. E. Rep. 706.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 18.

9. *Virginia F. & M. Ins. Co. v. Cummings*, Tex. Civ. App. , 78 S. W. Rep. 716.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 17.

RULE 32.

Knowledge of Broker.

There is no waiver or estoppel created by the knowledge of a broker when policy issues;¹ unless his status as an agent of the company is determined by a statute.²

1. *McGrath v. Home Ins. Co.*, 88 App. Div. 153, 84 N. Y. Supp. 374.

2. *Welch v. Fire Assoc.*, 124 Wis. 56, 98 N. W. Rep. 227.

And see this volume, title "Agents," and "Statutory Provisions."

RULE 33.

Pleading—Evidence—Burden of Proof—Question of Fact.

In an action on an insurance policy with a provision that the assured is the sole and unconditional owner of the property insured, the answer of the company should specify particularly the defects in the title, unless the defendant relies upon the defense that the plaintiff had no title to the property, in which case it is sufficient to deny that the plaintiff is the sole and unconditional owner (or allege that he was not such owner). When the issue is thus formed the plaintiff establishes *prima facie* sufficient ownership by proof that he was in possession of the property, claiming it as his own, and exercising acts of ownership over it when the policy was issued,¹ the burden of proof that the insured was not the unconditional sole owner rests upon the insurance company,² but where insured's statements as to interest or title are made warranties the burden may rest on him;³ the question of ownership becomes one of fact when the evidence is conflicting.⁴

1. *Sprigg v. American Cent. Ins. Co.*, 101 Ky. 185, 40 S. W. Rep. 575; *Kansas Ins. Co. v. Berry*, 8 Kans. 159. And see *Franklin Ins. Co. v. Chicago Ice Co.*, 36 Md. 102.

2. *Morris v. Imperial Ins. Co.*, 106 Ga. 461, 32 S. E. Rep. 595, 28 Ins. L. J. 402; *Gardner v. Continental Ins. Co.*, 75 S. W. Rep. 283 (Ky.).

3. *Williamson v. New Orleans Ins. Assoc.*, 84 Ala. 106, 4 So. Rep. 36.

4. *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Nebr. 717, 66 N. W. Rep. 646.

RULE 34.

Contract Severable.

The entire policy is not void when the insurance is voided as to the building, upon the ground that it is not owned solely and unconditionally, and in fee-simple. If the contents are separately insured in the same policy and are owned solely and unconditionally, the insured may recover for the same;¹ but when the insurance is contracted upon property as a whole, it is no answer to say that the insured owned part of it.²

1. *Mott v. Citizens' Ins. Co.*, 69 Hun, 501, 23 N. Y. Supp. 400.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 26.

2. *Dow v. National Assur. Co.*, R. I. , 58 Atl. Rep. 999.

RULE 35.

When Insured Sole and Unconditional Owner — Illustrative Cases.

The fact that the property is used under an agreement that the insured should own it and another party have part of the profits with a liability on part of the insured to account for such undivided profits does not prevent the insured from being the sole and unconditional owner;¹ and so where the insured has contracted to pay a third party one-third of the proceeds above expenses;² insurance of receivers as such neces-

sarily implies other interests;³ a husband in possession and enjoyment may be regarded as sole and unconditional owner of furniture owned by the wife prior to their marriage;⁴ and so as to a building erected after marriage and community property;⁵ wife may be regarded as sole and unconditional owner, notwithstanding homestead right of husband;⁶ where the property belongs to wife by gift from her husband it is no defense that such gift was in fraud of creditors;⁷ party who acquires title by devise in will "to be his forever for his own proper use" subject to restriction as to alienation until he attains the age of thirty years, is sole and unconditional owner.⁸ An owner of an estate in fee upon a condition subsequent and in possession with no condition broken, and a deed has been deposited in escrow to be delivered upon performance of the condition, is a sole and unconditional owner.⁹ An individual obtaining policy in a firm or partnership name may be regarded as sole and unconditional owner;¹⁰ so a partnership of four persons described in a corporate name as a company;¹¹ an assignment of one of the members of a firm or partnership does not affect the unconditional and sole ownership of the firm;¹² a party-wall does not affect¹³ nor does a mere defect in the title, not asserted, owing to erection of building beyond line of insured's lot on a street to extent of two feet;¹⁴ a grantee in a deed executed by the owner of all the capital stock of a corporation which owned the land, may be regarded as a sole and unconditional owner;¹⁵ outstanding contingent right of dower or curtesy does not prevent sole and unconditional ownership,¹⁶ mere defect in title by reason of

a reversionary interest of one-seventh does not necessarily prevent sole and unconditional ownership;¹⁷ may be such owner though deed is not actually delivered until after the fire;¹⁸ insured's ownership may not be affected by his deed recorded but not delivered;¹⁹ a widow who takes an equitable life estate as devisee and legal title as executrix and trustee, even though subject to a trust, may be sole and unconditional owner.²⁰

1. *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. Rep. 261; *Boutelle v. Westchester Ins. Co.*, 51 Vt. 4.

2. *Manchester Assur. Co. v. Abrams*, 89 Fed. Rep. 932, 32 C. C. A. 426.

3. *Liverpool, L. & G. Ins. Co. v. McNeill*, 89 Fed. Rep. 131, 59 U. S. App. 499.

4. *Georgia Home Ins. Co. v. Brady*, 41 S. W. Rep. 513 (Tex. Civ. App.).

And as to right of husband to insure as absolute owner of property under parol agreement, see also *Travis v. Continental Ins. Co.*, 47 Mo. App. 482.

5. *Warren v. Springfield F. & M. Ins. Co.*, 13 Tex. Civ. App. 466, 35 S. W. Rep. 810.

6. *Sun Fire Office v. Beneke*, 53 S. W. Rep. 98, Tex. Civ. App. . But see and compare *Trott v. Woolwich Ins. Co.*, 83 Me. 362, 22 Atl. Rep. 245.

7. *German Ins. Co. v. Heyman*, 34 Nebr. 704, 52 N. W. Rep. 401, 21 Ins. L. J. 941.

8. *Yost v. Dwelling-House Ins. Co.*, 179 Pa. St. 381, 35 Atl. Rep. 517, 26 Ins. L. J. 716.

9. *Davis v. Pioneer Furniture Co.*, 102 Wis. 394, 78 N. W. Rep. 596, 28 Ins. L. J. 474.

10. *Delaware Ins. Co. v. Bonnet*, 20 Tex. Civ. App. 107, 48 S. W. Rep. 1104; *Phoenix Ins. Co. v. McKennan*, 46 S. W. Rep. 10, 27 Ins. L. J. 870 (Ky.). And see *Re Pelican Ins. Co.*, 47 La. Ann. 935, 17 So. Rep. 427, 24 Ins. L. J. 535.

11. *Missouri Savings Assoc. v. German-American Ins. Co.*, 73 Mo. App. 158.

12. *Wood v. American Ins. Co.*, 149 N. Y. 382, 44 N. E. Rep. 80.

13. *Des Moines Ice Co. v. Niagara Ins. Co.*, 99 Iowa, 193, 68 N. W. Rep. 600, 26 Ins. L. J. 378; *Commercial Ins. Co. v. Allen*, 80 Ala. 571, 16 Ins. L. J. 641.

14. *Haider v. St. Paul F. & M. Ins. Co.*, 67 Minn. 514, 70 N. W. Rep. 805, 27 Ins. L. J. 222.

15. *Phoenix Assur. Co. v. Deavenport*, 16 Tex. Civ. App. 283, 41 S. W. Rep. 399.

16. *Virginia Ins. Co. v. Kloeber*, 31 Gratt. 749 (Va.); *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53.

17. *Williams v. Buffalo German Ins. Co.*, 17 Fed. Rep. 63, 12 Ins. L. J. 374.

18. *Mattocks v. Des Moines Ins. Co.*, 74 Iowa, 233, 37 N. W. Rep. 174. And see *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252.

19. *Walsh v. Vermont Ins. Co.*, 54 Vt. 351; *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. Rep. 188.

20. *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. Rep. 822, aff'g 108 Ill. App. 1.

RULE 36.

**When the Insured is not Sole and Unconditional Owner —
Illustrative Cases.**

The owner of an undivided part interest is not an unconditional sole owner within meaning of the policy;¹ and the owner of an interest held jointly with someone else is not an unconditional sole owner;² nor is a mortgagee such an owner;³ a conditional devise is not unconditional sole ownership;⁴ the interest of one partner in firm property is not such ownership;⁵ the interest of a purchaser of property at a judicial sale, which at time of issue of the policy had not been confirmed by the court, is not unconditional ownership;⁶ stockholders who take policy issued to themselves as owners are not sole and unconditional owners of property owned by the corporation;⁷ a deed which operates absolutely as a conveyance, though intended as security for a debt, prevents the grantor from being the

sole and unconditional owner;⁸ though it may be otherwise as to a bill of sale so intended;⁹ the ownership of property sold on judgment and execution, time for redemption not having expired, cannot be said to be unconditional and sole;¹⁰ an outstanding right or title of assignee or trustee in bankruptcy prevents one in possession under quitclaim deed from being the unconditional sole owner;¹¹ a life interest is not sole and unconditional ownership;¹² a surviving partner who is also the administrator of the deceased partner is not the sole and unconditional owner of partnership property.¹³

1. *Hebner v. Palatine Ins. Co.*, 157 Ill. 144, 41 N. E. Rep. 627, aff'g 55 Ill. App. 275; *Palatine Ins. Co. v. Dickenson*, 116 Ga. 794, 43 S. E. Rep. 52; *Miller v. Amazon Ins. Co.*, 46 Mich. 463, 10 Ins. L. J. 581; *Bradley v. German-American Ins. Co.*, 90 Mo. App. 369; *Fire Assoc. v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153; *Springfield F. & M. Ins. Co. v. Green*, 36 S. W. Rep. 143 (Tex. Civ. App.); *German-American Ins. Co. v. Paul*, 53 S. W. Rep. 442 (Ind. Terr.); *Liverpool, L. & G. Ins. Co. v. Cochran*, 77 Miss. 348, 26 So. Rep. 932; *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. Rep. 804, 26 Ins. L. J. 369; *Adema v. Insurance Co.*, 36 La. Ann. 660; *Noyes v. Hartford Ins. Co.*, 54 N. Y. 668; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25 (U. S.). And see *Capital City Ins. Co. v. Autrey*, 105 Ala. 269, 17 So. Rep. 326.

The condition does not apply to insurance of oil in pipe lines.

Grandin v. Rochester German Ins. Co., 107 Pa. St. 26, 14 Ins. L. J. 447.

2. *Schroedel v. Humboldt Ins. Co.*, 158 Pa. St. 459, 27 Atl. Rep. 1077, 23 Ins. L. J. 240.

3. *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. Rep. 149.

4. *Dwelling-House Ins. Co. v. Dowdall*, 49 Ill. App. 33.

5. *McFetridge v. Phoenix Ins. Co.*, 84 Wis. 200, 54 N. W. Rep. 326, 22 Ins. L. J. 211.

6. *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406.

7. *Syndicate Ins. Co. v. Bohn*, 65 Fed. Rep. 165, 12 C. C. A. 531, 27 U. S. App. 564, 24 Ins. L. J. 408; *McCormick v. Springfield F. & M. Ins. Co.*, 66 Cal. 361, 14 Ins. L. J. 373.

8. *Williamson v. Orient Ins. Co.*, 100 Ga. 791, 28 S. E. Rep. 914; prior appeal, 98 Ga. 464, 25 S. E. Rep. 560; *Alberts v. Insurance Co. N. A.*, 117 Ga. 854, 45 S. E. Rep. 282. See Rule 20.

9. *Kronk v. Birmingham Ins. Co.*, 91 Pa. St. 300. And see *Cook v. Lion Ins. Co.*, 67 Cal. 368, 14 Ins. L. J. 863.

10. *Reaper City Ins. Co. v. Brennan*, 58 Ill. 158.

11. *Southwick v. Atlantic Ins. Co.*, 133 Mass. 457, 12 Ins. L. J. 49.

12. *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202; *Davis v. State Ins. Co.*, 67 Iowa, 494, 15 Ins. L. J. 533; *Collins v. St. Paul F. & M. Ins. Co.*, 44 Minn. 440, 46 N. W. Rep. 906, 20 Ins. L. J. 179.

13. *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. Rep. 473.

TITLE IV.

Building on Ground not Owned in Fee Simple.

- RULE
1. As imposed by contract.
 2. Violation of condition voids policy—Burden of proof.
 3. Effect of written description.
 4. Presumption as to estate in fee.
 5. Equitable interest or title.
 6. Several individual interests insured may together amount to fee simple — When policy void.
 7. As dependent upon delivery and record of a deed.
 8. Effect of conveyance or deed not signed by wife.
 9. Effect of oral application and no inquiries.
 10. Duty of insured — Company not bound to inquire — May rely upon conditions of the policy.
 11. Company put upon inquiry by ambiguous answer in written application.
 12. When breach of condition.
 13. Leasehold interest.
 14. Partner may be owner in fee simple.
 15. Condition operative independent of statute governing a written application.
 16. Effect of mortgage clause — Omission of insured not an “act or neglect.”
 17. Assignment of lease may be valid as against insurance company though not consented to by lessor.
 18. Possession under an executory contract of sale.

RULE 19. Waiver or estoppel in issue and delivery of policy with knowledge of facts — Knowledge — Presumption.

20. Policy as a written contract not affected by mere knowledge of company's agent.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of insurance be a building on ground not owned by the insured in fee simple.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island,
New Jersey,	Wisconsin.

The standard form prescribed in Michigan is the same, except there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.”

The standard form of policy prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain the above provision.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

Under an old Maine statute, it was held that notwithstanding the building insured was on leased ground not owned in fee simple by the plaintiff, in a suit upon the policy, the question of

* See note to “Concealment,” Rule 1, page 2.

increase of risk must be submitted to, and determined by the jury before policy can be avoided. This statute would seem to be repealed by R. S., 1903. See Me. R. S., 1903, and Repealing Act, Me. R. S., 1903, p. 1015.

Atherton v. British America Assur. Co., 91 Me. 289, 39 Atl. Rep. 1006.

RULE 2.

Violation of Condition Voids Policy — Burden of Proof.

If the subject of insurance be a building on ground not owned by the insured in fee simple, and it is not otherwise provided by agreement indorsed upon or added to the policy, and there is no waiver or estoppel, the policy is void;¹ it is an affirmative defense, the burden in allegation and proof rests on the insurance company.²

1. *Overton v. American Central Ins. Co.*, 79 Mo. App. 1; *Home Ins. Co. v. Smith*, 29 S. W. Rep. 264 (Tex. Civ. App.); *Matthie v. Globe Ins. Co.*, 68 App. Div. 239, 74 N. Y. Supp. 177, aff'd, 174 N. Y. 489; *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. Rep. 779. And see *Leathers v. Insurance Co.*, 4 Fost. 259 (N. H.); *East Texas Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. Rep. 713.

2. *India River State Bank v. Hartford Ins. Co.*, Fla. , 35 So. Rep. 228.

RULE 3.

Effect of Written Description.

When the written description in the policy shows that the land is not, or could not be, owned in fee simple, the condition is inoperative;¹ so the insurance company is estopped by issuing a policy upon a building which, under a statute, is not subject to individual ownership.²

1. *Broadwater v. Lion Ins. Co.*, 34 Minn. 465, 15 Ins. L. J. 295; *Fowle v. Springfield Ins. Co.*, 122 Mass. 191.

2. *German-American Ins. Co. v. Paul*, Ind. Terr. , 83 S. W. Rep. 60. And see *Broadwater v. Lion Ins. Co.*, *supra*.

RULE 4.

Presumption as to Estate in Fee.

If the insured is in possession under a deed with a claim to the fee, it creates a presumption of an estate in fee.

Winneshiek Ins. Co. v. Schueller, 60 Ill. 465.

RULE 5.

Equitable Interest or Title.

An equitable interest or title in fee may be the equivalent of ownership in fee within meaning of the policy; the condition does not absolutely require legal title to be in the insured;¹ a person who takes an equitable life estate as devisee and the legal title as executor and trustee, even though subject to a trust, may be owner in fee simple.²

1. *Lewis v. New England Ins. Co.*, 24 Blatchf. 181, 29 Fed. Rep. 496; *Swift v. Vermont Ins. Co.*, 18 Vt. 305; *Pennsylvania Ins. Co. v. Dougherty*, 102 Pa. St. 568, 13 Ins. L. J. 52; *Elliott v. Ashland Ins. Co.*, 117 Pa. St. 548, 12 Atl. Rep. 676. And see *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620, 7 So. Rep. 596, 19 Ins. L. J. 916; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 So. Rep. 355.

2. *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. Rep. 822, aff'g 108 Ill. App. 1.

RULE 6.

Several Individual Interests Insured May Together Amount to Fee Simple — When Policy Void.

Even although the several individual interests of several parties insured may not amount to ownership in fee simple, if their combined interest amount to such a title, there is no violation of the condition; to hold

the policy void because of the condition in respect to the ownership of the land there must be ownership in some person other than the insured.

Mascott v. First Nat. Ins. Co., 69 Vt. 116, 37 Atl. Rep. 255.
And see *Scottish Union & Nat. Ins. Co. v. Petty*, 21 Fla. 399.

RULE 7.

As Dependent upon Delivery and Record of a Deed.

When the deed to insured is delivered to and held by a third party until performance of some condition which in fact is not performed, the insured cannot be said to be the owner in fee simple;¹ a deed must be delivered with intent to deliver; the recording of it is of no avail without the knowledge of the grantee.²

1. *Pangborn v. Continental Ins. Co.*, 62 Mich. 638, 16 Ins. L. J. 62.

2. *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. Rep. 188.

RULE 8.

Effect of Conveyance or Deed not Signed by Wife.

The fact that the insured has title to the land on which building insured is situated by a deed from a married man whose wife did not join in the conveyance, does not prevent the insured from being the owner in fee simple; the estate owned by the wife who did not sign the deed is an estate in the land itself, and not a mere incumbrance resting upon it, but it is not until the death of the husband that the wife has any claim, legal or equitable, upon the real estate so conveyed, and if she does not survive her husband, her estate terminates.

Ohio Farmers' Ins. Co. v. Bevis, 18 Ind. App. 17, 46 N. E. Rep. 928, 26 Ins. L. J. 623.

RULE 9.

Effect of Oral Application and no Inquiries.

When the application for the policy is an oral one, and no inquiries are made by the insurance company as to interest or title, and there is no misrepresentation or concealment, and the insured has an insurable interest, the company is presumed to intend to insure such interest and the conditions in the policy as to title or interest are inoperative to prevent a recovery.

Farmers & Merchants' Ins. Co. v. Mickel, Nebr. , 100 N. W. Rep. 130; Slobodisky v. Phoenix Ins. Co., 53 Nebr. 816, 74 N. W. Rep. 270; German Ins. Co. v. Kline, 44 Nebr. 395, 62 N. W. Rep. 857; Dooly v. Hanover Ins. Co., 16 Wash. 155, 47 Pac. Rep. 507; Glens Falls Ins. Co. v. Michael, Ind. , 74 N. E. Rep. 964. See Rule 10.

And see Title, "Interest Other Than Unconditional and Sole Ownership," Rule 11 *et seq.*

RULE 10.

Duty of Insured — Company not Bound to Inquire — May Rely upon Conditions of the Policy.

When the insured, without disclosing the facts, allows the insurance company to assume or infer that his interest or title is, under the terms of the policy, such as not to require disclosure or indorsement of consent, he must see to it that the conditions in the policy are complied with. It is not incumbent upon the insurance company to make inquiries or to make an investigation or examination of title, as it may legally rely upon the clauses or conditions of the policy;¹ but this rule has no application when the issue is upon disputed evidence as to whether the agent who

issued the policy did or did not at the time know the facts.²

1. See Title, "Interest Other Than Unconditional and Sole Ownership," Rules 12, 13, and cases cited thereunder, and Vol. 1, Fire Insurance as a Valid Contract, "Construction and Interpretation of Contract," Rule 5.

2. *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. Rep. 779. And see Rule 19.

RULE 11.

Company Put upon Inquiry by Ambiguous Answer in Written Application.

When the company is put upon inquiry by an incomplete, ambiguous, or uncertain answer relating to title in a written application, and issues a policy without further inquiry, it may be assumed that it intended to insure whatever insurable interest the applicant had in the entire premises.

Clawson v. Citizens' Ins. Co., 121 Mich. 591, 80 N. W. Rep. 573.

RULE 12.

When Breach of Condition.

There is no breach of the condition requiring ownership in fee simple until it is totally broken; if insured owns in fee simple a part of the land on which the building is situated the condition is not broken, although he does not own the other part.

Haider v. St. Paul F. & M. Ins. Co., 67 Minn. 514, 27 Ins. L. J. 222, 70 N. W. Rep. 805.

RULE 13.

Leasehold Interest.

A leasehold interest in the insured cannot be claimed to be ownership in fee simple;¹ but insured may be

owner in fee, notwithstanding he has leased property to a third party.² Where policy insures a leasehold interest, ownership of fee is immaterial.³

1. *Matthie v. Globe Ins. Co.*, 68 App. Div. 239, 74 N. Y. Supp. 177, aff'd, 174 N. Y. 489; *Mers v. Franklin Ins. Co.*, 68 Mo. 127. And see *East Texas Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. Rep. 713; *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Dowd v. American Ins. Co.*, 41 Hun, 139.

2. *Insurance Co. v. Haven*, 5 Otto, 242 (U. S.).

3. *Philadelphia Tool Co. v. British Amer. Assur. Co.*, 132 Pa. St. 236, 19 Atl. Rep. 77.

Under the old forms which read "If the interest in the property to be insured be a leasehold, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing otherwise the insurance shall be void," it was held that a lessee with right to remove building or sell at appraised value, etc., might be regarded as the absolute owner and insure or be insured as such without voiding the insurance.

See *Hope Ins. Co. v. Brolaskey*, 35 Pa. St. 282. Also *Mitchell v. Home Ins. Co.*, 32 Iowa, 421; *David v. Hartford Ins. Co.*, 13 Iowa, 69; *Mayor v. Exchange Ins. Co.*, 9 Bosw. 424 (N. Y.); *Stickney v. Niagara Ins. Co.*, 23 Up. Can. C. P. 372.

See now Rule 1, and note change in language.

RULE 14.

Partner May be Owner in Fee Simple.

A partner may be and remain the owner in fee simple, though the partnership has use of the building.

Weber v. American Central Ins. Co., 35 Mo. App. 521. And see *Citizens' Ins. Co. v. Doll*, 35 Md. 89.

RULE 15.

Condition Operative Independent of Statute Governing Written Application.

The condition is operative independently of a statute requiring copy of a written application to be attached to or indorsed upon the policy, and it is error to

exclude evidence tending to show violation or a breach of the condition upon the ground that such a statute was not complied with.

MacKinnon v. Mutual Ins. Co., 89 Iowa, 170, 56 N. W. Rep. 423, 23 Ins. L. J. 39.

RULE 16.

Effect of Mortgagee Clause — Omission of Insured not an "Act or Neglect."

The mortgagee clause does not relieve the mortgagee to whom loss is payable from the consequences of a failure upon part of the owner, to truly state his interest, if other than fee simple, in the insured property. Such an omission is not an "act or neglect" within the meaning of these terms as used in the mortgagee clause.

Genesee Falls Savings Assoc. v. United States Ins. Co., 16 App. Div. 587, 44 N. Y. Supp. 979.

And see Vol. 1, Fire Insurance as a Valid Contract, "Mortgagee and Mortgagee."

RULE 17.

Assignment of Lease May be Valid as Against Insurance Company Though not Consented to by Lessor.

When the policy insures a building on leased ground, and the lease has been assigned by the original lessee to the insured the day before policy issues, but the lessor has not consented to the assignment as required by the terms of the lease, the assignment of the lease is valid as against the insurance company, and there is no such misrepresentation or concealment or defect in title as to ownership as to void the insurance on those grounds.

Caplis v. American Ins. Co., 60 Minn. 376, 62 N. W. Rep. 440, 24 Ins. L. J. 551.

RULE 18.

Possession Under an Executory Contract of Sale.

When the assured is in possession under an enforceable executory contract of purchase, and is the equitable owner, such ownership may be regarded as in fee simple within meaning of the policy;¹ but a specific statement by the insured that he owns the property in fee and has a clear title to it, when in fact he has only an executory contract for purchase, may be such a misrepresentation as to avoid the policy;² such a contract held by the insured as collateral security for money loaned does not make him an owner in fee simple;³ and such a contract does not necessarily make the vendee an owner in fee simple.⁴

1. *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 So. Rep. 419, 25 Ins. L. J. 816, 33 L. R. A. 258; *Pennsylvania Ins. Co. v. Hughes*, 108 Fed. Rep. 497, 47 C. C. A. 459; *Lewis v. New England Ins. Co.*, 24 Blatchf. 181, 29 Fed. Rep. 496; *Elliott v. Ashland Ins. Co.*, 117 Pa. St. 548, 12 Atl. Rep. 676; *Brighton Beach Racing Assoc. v. Home Ins. Co.*, 93 N. Y. Supp. 654.

2. *Wooliver v. Boylston Ins. Co.*, 104 Mich. 132, 62 N. W. Rep. 149, 24 Ins. L. J. 793.

3. *Gettleman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. Rep. 627, 27 Ins. L. J. 160.

4. *Mott v. Citizens' Ins. Co.*, 69 Hun, 501, 23 N. Y. Supp. 400; *Brooks v. Erie Ins. Co.*, 76 App. Div. 275, 78 N. Y. Supp. 748.

RULE 19.

Waiver or Estoppel in Issue and Delivery of Policy with Knowledge of Facts — Knowledge — Presumption.

Issue and delivery of the policy with knowledge by the company or its agent of the fact that the building is on ground not owned by the insured in fee simple, operates as a waiver or estoppel, preventing the com-

pany from claiming a forfeiture by reason of such fact;¹ and so when the insured's written application shows that he is not the owner in fee simple;² but the agent's knowledge as to the building being on leased ground may not be imputable to the company when acquired incidentally outside of or independent of any matter connected with the insurance, some months prior, and not present in his mind at time of issue of the policy,³ if such knowledge is acquired in usual course of his business as an insurance agent, even a year prior, the presumption is that such knowledge continues and exists.⁴

1. *Parsons v. Knoxville Ins. Co.*, 32 Mo. 583, 31 S. W. Rep. 117, 24 Ins. L. J. 852; *Flournoy v. Traders' Ins. Co.*, 80 Mo. App. 655; *Farmers' Ins. Co. v. Jackman*, Ind. App. , 73 N. E. Rep. 730; *Cowell v. Phoenix Ins. Co.*, 126 N. C. 684, 36 S. E. Rep. 184; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 65 S. W. Rep. 611; *Phoenix Ins. Co. v. Phillips*, 16 Ky. L. Rep. 122; *Goss v. Agricultural Ins. Co.*, 92 Wis. 233, 65 N. W. Rep. 1036; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. Rep. 738, 25 Ins. L. J. 430; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. Rep. 13, 24 Ins. L. J. 458; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254, 21 Ins. L. J. 455; *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. Rep. 915; *Baldwin v. Citizens' Ins. Co.*, 60 Hun, 389, 15 N. Y. Supp. 587. And see *Dresser v. United Firemen's Ins. Co.*, 45 Hun, 298, aff'd, 122 N. Y. 642, without opinion; *Wooliver v. Boylston Ins. Co.*, 104 Mich. 132, 62 N. W. Rep. 149, 24 Ins. L. J. 793; *Home Ins. Co. v. Duke*, 75 Ind. 535; *Germania Ins. Co. v. Hick*, 125 Ill. 361, 17 N. E. Rep. 792; *Johnson v. Aetna Ins. Co.*, Ga. , 51 S. E. Rep. 339.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 8 and 16.

2. *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. Rep. 1115; *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238.

3. *Sergeant v. Liverpool, L. & G. Ins. Co.*, 66 App. Div. 46, 73 N. Y. Supp. 120.

4. *Ahlberg v. German Ins. Co.*, 94 Mich. 259, 53 N. W. Rep. 1102, 22 Ins. L. J. 307.

And see Vol. 1, Fire Insurance as a Valid Contract, "Waiver," Rule 17. Also this volume, chapter on "Agents."

RULE 20.

Policy as a Written Contract not Affected by Mere Knowledge of Company's Agent.

The policy, as a written contract, is not affected or superseded by the mere knowledge of company's agent. An unambiguous written contract, when sued on in a court of law, is unalterable, and for that reason the knowledge or fraud of company's agent does not prevent a forfeiture on ground that the land was not owned in fee simple.

Martin v. Insurance Co. of N. A., 57 N. J. L. 623, 31 Atl. Rep. 213.

And see and compare Rule 19. And Vol. 1, Fire Insurance, as a Valid Contract, "Waiver," Rules 8 and 16. And this volume, chapter on "Warranty," Rule 29, note 3.

TITLE V.

Incumbrance by Chattel Mortgage.

- RULE**
1. As imposed by contract.
 2. Policy void or voidable — No question of good faith, concealment, or increase of risk — Burden of proof.
 3. Instrument must be legally operative — Delivery.
 4. Does not depend upon form — Liens — Construction.
 5. Application of rule admitting parol evidence.
 6. Chattel mortgage by one partner to another.
 7. Stocks of merchandise and the like.
 8. Effect of description of property as held in trust or sold but not delivered.
 9. If policy voided subsequent release or discharge does not revive it.
 10. As affected by payment or discharge.
 11. Existence of chattel mortgage renders policy void — Omission to make inquiry cannot strike out provision of policy.

- RULE 12.** Duty of insured — Insurance company not bound to inquire — May be put upon inquiry.
13. Effect of issue of policy upon oral application without inquiry.
14. Waiver or estoppel in issue and delivery of policy — When chargeable with knowledge — Newspapers — Public records — Collusion and fraud.
15. Substitution of one mortgage for another — As affected by decrease or increase in amount — Change in form.
16. Duty of insured to procure written consent — Oral promise of agent insufficient.
17. Contract severable.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of insurance be personal property and be or become incumbered by a chattel mortgage.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island,
New Jersey,	Wisconsin.

The standard form prescribed in Michigan is the same except there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.”

The standard form of policy prescribed in

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain above provision.

* See note to “Concealment,” Rule 1, page 2.

In the States where no standard form is prescribed, and other than those above named the New York standard form is in general use.

Under the Tennessee statute governing misrepresentation there must be intent to deceive or defraud, unless risk is increased.

Light v. Insurance Co., 105 Tenn. 480, 58 S. W. Rep. 851. See statutory provisions.

Many of the old forms contained a specific provision against incumbrances, such as "If the property be or become incumbered by a mortgage, deed of trust, judgment or otherwise," and it was held that the provision applied to acts of the insured only, or to incumbrances created by his consent.

Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. Rep. 691, 24 Ins. L. J. 385; *Georgia Home Ins. Co. v. Schild*, 73 Miss. 128, 19 So. Rep. 94.

A vendor's lien was held to be an incumbrance.

Curlee v. Texas Home Ins. Co., 31 Tex. Civ. App. 471, 73 S. W. Rep. 831.

A mechanic's lien was held to be an incumbrance, and the insured was liable for acts of third parties.

Smith v. St. Paul F. & M. Ins. Co., 106 Iowa, 225, 76 N. W. Rep. 676. And see *Greenlee v. Iowa Ins. Co.*, 102 Iowa, 260, 71 N. W. Rep. 224.

But all the facts necessary to constitute a lien must be proved.

Omaha Ins. Co. v. Thomson, 50 Nebr. 580, 70 N. W. Rep. 30.

A judgment was held not to be an incumbrance.

Lodge v. Capitol Ins. Co., 91 Iowa, 103, 58 N. W. Rep. 1089, 23 Ins. L. J. 735.

Such clauses or conditions were recognized and enforced by the courts.

Ramer v. American Cent. Ins. Co., 70 Mo. App. 47; *Collins v. Merchants & Bankers' Ins. Co.*, 95 Iowa, 540, 64 N. W. Rep. 602; *Houdeck v. Merchants & Bankers' Ins. Co.*, 102 Iowa, 303, 71 N. W. Rep. 354.

And were subject to waiver.

Rockford Ins. Co. v. Williams, 56 Ill. App. 338; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. Rep. 959.

Though an agent when policy issued could not waive as to future incumbrances.

Milwaukee Mechanics' Ins. Co. v. Niewedde, 12 Ind. App. 145, 39 N. E. Rep. 757; *Dwelling-House Ins. Co. v. Shaner*, 52 Ill. App. 326.

In *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. Rep. 665, it was held that even if a lease was an incumbrance it was not covered or included under construction of the entire contract and facts of the case.

And see this volume, chapter "Change in Interest, Title, or Possession."

RULE 2.

Policy Void or Voidable — No Question of Good Faith, Concealment, or Increase of Risk — Burden of Proof.

A chattel mortgage upon the subject of the insurance renders the policy void, or voidable, at election of the insurance company;¹ and the result is not affected by any question of bad faith in concealment or increase of risk;² the chattel mortgage must cover the subject of insurance;³ the burden, both in allegation and proof, rests upon the insurance company.⁴

1. *Walker v. Phoenix Ins. Co.*, 156 N. Y. 628, 51 N. E. Rep. 392; *Gray v. Guardian Ins. Co.*, 82 Hun, 380, 31 N. Y. Supp. 237; *Thorne v. Ætna Ins. Co.*, 102 Wis. 593, 78 N. W. Rep. 920; *First Nat. Bank v. American Cent. Ins. Co.*, 58 Minn. 492, 60 N. W. Rep. 345, 24 Ins. L. J. 55; *Crikelair v. Citizens' Ins. Co.*, 68 Ill. App. 637, aff'd, 168 Ill. 309, 48 N. E. Rep. 167; *Brown v. Westchester Ins. Co.*, 9 Kans. App. 526, 58 Pac. Rep. 276; *Home Ins. Co. v. Johansen*, 59 Nebr. 349, 80 N. W. Rep. 1047; *Insurance Co. N. A. v. Wicker*, 54 S. W. Rep. 300, Tex. Civ. App. , aff'd, 93 Tex. 390, 55 S. W. Rep. 740. And see *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. Rep. 326, 27 Ins. L. J. 794; *Brennen v. Connecticut Ins. Co.*, 99 Mo. App. 718, 74 S. W. Rep. 406.

2. *Firemen's Fund Ins. Co. v. Barker*, 6 Colo. App. 535, 41 Pac. Rep. 513.

3. *Moriarty v. United States Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. Rep. 132.

4. *India River State Bank v. Hartford Ins. Co.*, Fla. , 35 So. Rep. 228.

RULE 3.

Instrument Must be Legally Operative — Delivery.

The chattel mortgage must be legally operative as such;¹ an instrument executed, but not delivered, is inoperative to void the policy.² When a chattel mortgage is executed and delivered in order to take effect as security immediately, and for that purpose only, the delivery cannot be construed as in escrow to avoid a forfeiture.³ It voids the policy even though it is afterward decreed void as in fraud of creditors.⁴

1. *Weigen v. Council Bluffs Ins. Co.*, 104 Iowa, 410, 73 N. W. Rep. 862, 27 Ins. L. J. 260; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371.

2. *Insurance Co. N. A. v. Wicker*, 93 Tex. 390, 55 S. W. Rep. 740; *Clifton Coal Co. v. Scottish Union & National Ins. Co.*, 102 Iowa, 300, 71 N. W. Rep. 433, 26 Ins. L. J. 1007; *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. Rep. 324, 27 Ins. L. J. 19; *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. Rep. 771.

3. *Adler v. Germania Ins. Co.*, 17 Misc. 347, 39 N. Y. Supp. 1070, rev'g 15 Misc. 471, 37 N. Y. Supp. 207.

4. *Secrest v. Hartford Ins. Co.*, 68 S. C. 378, 47 S. E. Rep. 680.

RULE 4.

Does not Depend on Form — Liens — Construction.

No particular form of words is necessary to constitute a chattel mortgage; if, without regard to form, the instrument is in legal effect a chattel mortgage, it voids the policy;¹ but a mere lien created under an executory agreement will not be construed as a chattel mortgage;² these words, as used in the policy, must be construed in their popular sense and as simply guarding against the common ordinary chattel mortgages

and instruments of the same general nature, use, and purpose.³

1. *Roe v. Town Mutual Ins. Co.*, 78 Mo. App. 452; *Fitzgerald v. Atlantic Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp. 552; *Peet v. Dakota Ins. Co.*, 7 S. D. 410, 64 N. W. Rep. 206, 25 Ins. L. J. 88; *Hunt v. Springfield F. & M. Ins. Co.*, 20 App. D. C. 48, aff'd, 196 U. S. 47, 25 Sup. Ct. Rep. 179. In this case a trust deed was held to be in legal effect a chattel mortgage.

That an instrument is a chattel mortgage when legally operative as such without regard to form, see also *Susman v. Whyard*, 149 N. Y. 130; *Blake v. Corbett*, 120 N. Y. 329; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 579; *Heyford v. Davis*, 102 U. S. 235, 245; *Hughes v. Harlan*, 37 App. Div. 528, aff'd, 166 N. Y. 427; *Ward v. Lord*, 100 Ga. 407, 28 S. E. Rep. 446; *Lumbert v. Woodard*, 144 Ind. 335, 341; *Bertschy v. Bank*, 89 Wis. 473; *Lewis v. Bell*, 40 S. W. Rep. 747, Tex. Civ. App.

2. *Pennsylvania Ins. Co. v. Hughes*, 108 Fed. Rep. 497, 47 C. C. A. 459; *Caplis v. American Ins. Co.*, 60 Minn. 376, 62 N. W. Rep. 440, 24 Ins. L. J. 551.

3. *Caplis v. American Ins. Co.*, *supra*. And see *Bleakely v. Nelson*, 56 N. J. Eq. 674.

RULE 5.

Application of Rule Admitting Parol Evidence.

The claim that a delivered chattel mortgage was not to become a binding contract until performance or occurrence of some condition precedent resting in parol is subject to suspicion, and the rule admitting such evidence should be cautiously applied and the facts clearly proven. If the contract is executed and delivered with intent to take effect, it is not to be thereafter avoided by virtue of a condition annexed to the delivery by parol.

Thorne v. Aetna Ins. Co., 102 Wis. 593, 78 N. W. Rep. 920.

RULE 6.

Chattel Mortgage by One Partner to Another.

When a firm or partnership is insured, a chattel mortgage executed by one of the partners to another, to secure advances, conveys only an interest in the surplus of the partnership property after payment of the debts, and introduces no stranger into ownership of the firm property. A chattel mortgage thus executed does not void a policy previously issued to the firm on the mortgaged property.

Moulton v. Ætna Ins. Co., 25 App. Div. 275, 49 N. Y. Supp. 570; *Alston v. Phoenix Ins. Co.*, 100 Ga. 287, 27 S. E. Rep. 981, 27 Ins. L. J. 77.

RULE 7.

Stocks of Merchandise and the Like.

When the policy insures only such property as should answer the description at time of the fire, such as stocks of merchandise or grain, malt or grain in process of malting, a chattel mortgage on a part of the malt does not affect the insurance on balance of property answering to the description at time of fire.

Coleman v. Phoenix Ins. Co., 3 App. Div. 65, 38 N. Y. Supp. 986. And see *Tompkins v. Hartford Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184.

RULE 8.

Effect of Description of Property as Held in Trust or Sold but not Delivered.

The written portion of a policy describing property insured as "its own or held by it in trust or on commission, or sold, but not delivered," does not annul or

supersede the printed condition against a chattel mortgage.

First Nat. Bank *v.* American Central Ins. Co., 58 Minn. 492, 60 N. W. Rep. 345, 24 Ins. L. J. 55.

RULE 9.

If Policy Voided Subsequent Release or Discharge Does not Revive It.

When a chattel mortgage covering the subject of the insurance is once shown to exist, it voids the policy according to its terms, and a court has no authority to reinstate the policy without the consent of the insurance company. A subsequent release or discharge of the mortgage, even the day after the policy issues, does not operate to revive the policy;¹ it cannot be claimed that liability on the policy is merely suspended, subject to being revived upon payment of the mortgage debt;² it can be revived only by some act or consent of the insurance company.³

1. Insurance Co. N. A. *v.* Wicker, 93 Tex. 390, 55 S. W. Rep. 740, aff'g 54 S. W. Rep. 300; Gray *v.* Guardian Ins. Co., 82 Hun, 380, 31 N. Y. Supp. 237.

2. German-American Ins. Co. *v.* Humphrey, 62 Ark. 348, 35 S. W. Rep. 428, 25 Ins. L. J. 658.

3. Gray *v.* Guardian Ins. Co., *supra*. And see Walker *v.* Phoenix Ins. Co., 156 N. Y. 628, 51 N. E. Rep. 392.

RULE 10.

As Affected by Payment or Discharge.

Payment and discharge of the chattel mortgage before a loss operates to revive the contract and to restore the protection of the policy as to the property covered or included in the mortgage;¹ and a parol re-

lease of a chattel mortgage may be effective, though not evidenced of record in any manner.²

1. *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. Rep. 676; *Home Ins. Co. v. Johansen*, 59 Nebr. 349, 80 N. W. Rep. 1047; *Johansen v. Home Ins. Co.*, 54 Nebr. 548, 74 N. W. Rep. 866, 27 Ins. L. J. 610; *Omaha Ins. Co. v. Dierks*, 43 Nebr. 473, 61 N. W. Rep. 740.

2. *Johansen v. Home Ins. Co.*, *supra*. See Rule 9.

RULE 11.

Existence of Chattel Mortgage Renders Policy Void — Omission to Make Inquiry Cannot Strike Out Provision of Policy.

When there is no element of waiver or estoppel, arising from knowledge of the company or its agent, the existence of a chattel mortgage renders the policy void. The insured is bound by the terms of the policy which he accepts, and the fact that no inquiries were made by the company or its agent, and no representations by the insured in a written application or otherwise, cannot strike out the provision of the policy.

Crikelair v. Citizens' Ins. Co., 68 Ill. App. 637, aff'd, 168 Ill. 309, 48 N. E. Rep. 167; *Indiana Ins. Co. v. Pringle*, 21 Ind. App. 559, 52 N. E. Rep. 821; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204; *Harding v. Norwich Union Ins. Soc.*, 10 S. D. 64, 71 N. W. Rep. 755, 26 Ins. L. J. 901; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. Rep. 915, 25 Ins. L. J. 833; *Sulphur Mines Co. v. Phoenix Ins. Co.*, 94 Va. 355, 26 S. E. Rep. 856.

And see Title, "Interest other than Unconditional and Sole Ownership," Rules 12, 13.

RULE 12.

Duty of Insured — Insurance Company not Bound to Inquire — May be Put upon Inquiry.

It is the duty of an applicant for insurance to comply with the conditions of the policy and to give the

information requisite for its validity. The company may rely on the presumption that the insured has stated all the material facts, and, as a rule, is not bound to make inquiries. But when the company's agent is by the insured put upon inquiry, and fails to make it, then he is chargeable with notice or knowledge of chattel mortgage, which such inquiry would have disclosed, though having no actual knowledge of it when he issued the policy.

Skinner v. Norman, 165 N. Y. 565, 59 N. E. Rep. 309.

RULE 13.

Effect of Issue of Policy upon Oral Application Without Inquiry.

When policy issues upon an oral application without any inquiry by the insurance company or its agent as to liens or other incumbrances upon the property, and without any statement or representation in reference thereto by the insured, and there is no evidence that the insured was informed or knew that, if a mortgage existed, the company would not take the risk, or that it would insert in the policy which it agreed to issue a clause making it void if the property was so incumbered, the company is deemed by its action to have consented to assume the risk of such liens or incumbrances as may have been upon the property, and to that extent waived or dispensed with the printed condition.

Arthur v. Palatine Ins. Co., 35 Oreg. 27, 57 Pac. Rep. 62, 28 Ins. L. J. 545; *Allesina v. Liverpool, L. & G. Ins. Co.*, Oreg. , 78 Pac. Rep. 392; *Koshland v. Hartford Ins. Co.*, 31 Oreg. 402, 49 Pac. Rep. 866, 26 Ins. L. J. 945; *Sproul v.*

Western Assur. Co., 33 Oreg. 98, 54 Pac. Rep. 180, 28 Ins. L. J. 118; Phoenix Ins. Co. v. Fuller, 53 Nebr. 811, 74 N. W. Rep. 269; Insurance Co. N. A. v. Bachler, 44 Nebr. 549, 62 N. W. Rep. 911, 24 Ins. L. J. 481; Wright v. Insurance Co., 12 Mont. 474, 31 Pac. Rep. 87; Queen Ins. Co. v. Kline, 32 S. W. Rep. 214, 25 Ins. L. J. 236; Lancashire Ins. Co. v. Monroe, 101 Ky. 12, 39 S. W. Rep. 434; Cleavenger v. Franklin Ins. Co., 47 W. Va. 595, 35 S. E. Rep. 998; Union Assur. Soc. v. Nalls, 101 Va. 613, 44 N. E. Rep. 896.

While the rule as stated above has been made and enforced by courts of a number of the States, it is suggested that the cases frequently cited to sustain it were really in principle decided upon consideration of the question of concealment or in connection with a written application, which presents an entirely different issue from that of a violation of the specific condition relating to a chattel mortgage.

See for example of the cases above cited, Lancashire Ins. Co. v. Monroe, *supra*; Koshland v. Hartford Ins. Co., *supra*; Sproul v. Western Assur. Co., *supra*. And see Union Assur. Soc. v. Nalls, *supra*. And see preceeding rules.

RULE 14.

Waiver or Estoppel in Issue and Delivery of Policy — When Chargeable with Knowledge — Newspapers — Public Records — Collusion and Fraud.

Issue and delivery of a policy, with knowledge by the company or its agent of the existence of a chattel mortgage, operates as a waiver or estoppel preventing the company from claiming a forfeiture by reason of such fact;¹ a soliciting agent of the insurance company may bind it by his knowledge of the fact;² the company or its agent is not chargeable with notice or knowledge of an item in a newspaper,³ or of a public record,⁴ but if the agent is put upon inquiry it may operate as sufficient notice or knowledge.⁵ Collusion and fraud between the company's agent and the holder of a chattel mortgage cannot be predicated upon the agent's

advice not to have loss made payable to him as policy would be canceled.⁶

1. *Robbins v. Springfield Ins. Co.*, 149 N. Y. 477, 44 N. E. Rep. 159, aff'g 79 Hun, 117, 29 N. Y. Supp. 513; *Skinner v. Norman*, 165 N. Y. 565; *McGuire v. Hartford Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp. 300, aff'd, 158 N. Y. 680, without opinion; *Neafie v. Woodcock*, 15 App. Div. 618, 44 N. Y. Supp. 768; *Southern Ins. Co. v. Stewart*, Miss. , 30 So. Rep. 755; *German-American Ins. Co. v. Yeagley*, Ind. , 71 N. E. Rep. 897; *Fire Assoc. v. Yeagley*, Ind. App. , 72 N. E. Rep. 1035; *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, 25 S. E. Rep. 417; *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. Rep. 162; *McDonald v. Fire Assoc.*, 93 Wis. 348, 67 N. W. Rep. 719, 25 Ins. L. J. 708; *London & Lancashire Ins. Co. v. Fischer*, 92 Fed. Rep. 500, 34 C. C. A. 503, 28 Ins. L. J. 452; *McElroy v. British Amer. Ins. Co.*, 94 Fed. Rep. 990 (these and similar cases in the Federal courts are substantially overruled by *Northern Assur. Co. v. Grand View Building Assoc.*, 183 U. S. 308. See Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 8); *Rediker v. Queen Ins. Co.*, 107 Mich. 224, 65 N. W. Rep. 105, following *Beebe v. Insurance Co.*, 93 Mich. 514; *Raymond v. Farmers' Ins. Co.*, 114 Mich. 386, 72 N. W. Rep. 254; *Cowart v. Capital City Ins. Co.*, 114 Ala. 356, 27 Ins. L. J. 246, 22 So. Rep. 574; *West v. Norwich Union Ins. Co.*, 10 Utah, 442, 24 Ins. L. J. 367, 37 Pac. Rep. 685.

2. *Firemen's Ins. Co. v. Horten*, 170 Ill. 258, 48 N. E. Rep. 955, aff'g 68 Ill. App. 497; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. Rep. 366.

3. *American Ins. Co. v. Landfare*, 56 Nebr. 482, 76 N. W. Rep. 1068.

4. *Traders' Ins. Co. v. Cassell*, 24 Ind. App. 238, 56 N. E. Rep. 259; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. Rep. 757; *United States Ins. Co. v. Moriarty*, 36 S. W. Rep. 943, Tex. Civ. App. ; *Wicke v. State Ins. Co.*, 90 Iowa, 4, 57 N. W. Rep. 632; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. Rep. 915, 25 Ins. L. J. 833; *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516, 52 N. E. Rep. 771. But see and compare *Collins v. London Assur. Co.*, 165 Pa. St. 298, 30 Atl. Rep. 924, 24 Ins. L. J. 658; *Wright v. Insurance Co.*, 12 Mont. 474, 31 Pac. Rep. 87.

5. *Skinner v. Norman*, 165 N. Y. 565, 59 N. E. Rep. 309; *Corkery v. Security Ins. Co.*, 99 Iowa, 382, 68 N. W. Rep. 792, 26 Ins. L. J. 331.

And see also Vol. 1, Fire Insurance as a Valid Contract, "Waiver."

As to waiver after a fire, see *Kiernan v. Dutchess County Ins. Co.*, 150 N. Y. 190, 44 N. E. Rep. 698, aff'g 80 Hun, 602; *Nugent v. Rensselaer County Ins. Co.*, App. Div. , 94 N. Y. Supp. 605.

6. *Phoenix Ins. Co. v. McKernan*, 46 S. W. Rep. 10, 27 Ins. L. J. 870.

In *Hammond v. Insurance Co. N. A.*, 24 Ohio Cir. 101, it was held that mere knowledge or notice to agent who issues the policy was not admissible as tending to vary a written contract. Citing *Smith v. Insurance Co.*, 19 Ohio St. 287, 290. The question of estoppel does not appear to have been raised.

See Vol. 1, Fire Insurance as a Valid Contract, "Waiver," and compare Rules 8, 12, 16. Also this volume, chapter on "Agents."

RULE 15.

Substitution of One Mortgage for Another — As Affected by Decrease or Increase in Amount — Change in Form.

When policy is issued, with knowledge by the company of an existing chattel mortgage, the subsequent mortgaging of same property to pay off the first mortgage, the one being practically a substitute for the other, does not constitute a violation of the condition as to a chattel mortgage; and this is true even although the amount be decreased in the new mortgage; it is only when the amount of the mortgage is increased that a forfeiture may be claimed;¹ and same principle applies to a renewal of a mortgage, or division into two mortgages, amount not being increased,² and so by a mere change in form without increasing the amount.³

1. *Koshland v. Home Ins. Co.*, 31 Oreg. 321, 49 Pac. Rep. 864, 26 Ins. L. J. 940; rehearing denied, 31 Oreg. 327, 50 Pac. Rep. 567, 27 Ins. L. J. 304.

2. *Georgia Home Ins. Co. v. Stein*, 72 Miss. 943, 18 So. Rep. 414. And see *Kansas Farmers' Ins. Co. v. Saindon*, 52 Kans. 486, 35 Pac. Rep. 15, 23 Ins. L. J. 208; *Kansas Farmers' Ins. Co. v. Saindon*, on rehearing, 53 Kans. 623, 36 Pac. Rep. 983; *Weiss v. American Ins. Co.*, 148 Pa. St. 349, 23 Atl. Rep. 991.

But see and compare *Pennsylvania Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. Rep. 55.

3. *Farmers' Ins. Co. v. Newman*, 58 Nebr. 504, 78 N. W. Rep. 933.

RULE 16.

Duty of Insured to Procure Written Consent — Oral Promise of Agent Insufficient.

If, after the issue of the policy, the insured executes a chattel mortgage upon the property covered, it is incumbent upon him, the policy being in his possession or under his control, to procure the required indorsement of the company's consent upon the policy; an oral promise on part of the company's agent to attend to it is ineffective to prevent forfeiture.

Tompkins v. Hartford Ins. Co., 22 App. Div. 380, 49 N. Y. Supp. 184.

Under the Iowa statute (Code, § 1750; see Statutory Provisions) defining or fixing the status of an agent, he may orally waive or consent to a chattel mortgage after the issue of the policy, notwithstanding limitations in the policy upon his power and authority.

Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co., Iowa, , 101 N. W. Rep. 749.

As to the power of agents to orally waive the conditions of the policy or to estop the company by their declarations or conduct, after its issue and delivery, the courts do not agree.

See this volume, chapter on "Agents," and Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver."

RULE 17.

Contract Severable.

When the policy or contract of insurance is severable, and the chattel mortgage covers and includes only a part of the subject of the insurance, the policy is void only as to such part, and remains valid as to the balance of the insurance when separated or item-

ized in the policy;¹ the construction is that the entire policy shall be void as to the property incumbered by the mortgage.² While a policy may be severable when covering in specified several amounts several items, and breach of condition as to one item will not void the others as to each item, the contract is entire and indivisible, and if it consists of a number of designated articles, if void for a chattel mortgage on one, it voids the entire item.³

1. *Kiernan v. Agricultural Ins. Co.*, 81 Hun, 373, 30 N. Y. Supp. 892, rev'g, on rehearing, 72 Hun, 519, 25 N. Y. Supp. 438; *Knowles v. American Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50, aff'd, 142 N. Y. 641, on opinion below; *North British & M. Ins. Co. v. Freeman*, 33 S. W. Rep. 1091 (Tex. Civ. App.); *Delaware Ins. Co. v. Harris*, 64 S. W. Rep. 867, Tex. Civ. App. ; *German Ins. Co. v. Luckett*, 12 Tex. Civ. App. 139, 34 S. W. Rep. 173; *Taylor v. Anchor Ins. Co.*, 116 Iowa, 625, 88 N. W. Rep. 807.

2. *Knowles v. American Ins. Co.*, *supra*.

3. *Home Ins. Co. v. Bernstein*, 55 Nebr. 260, 75 N. W. Rep. 839, 28 Ins. L. J. 731 (disapproving *Phoenix Ins. Co. v. Lorenz*, Ind. , 29 N. E. Rep. 604); *Vucci v. North British & M. Ins. Co.*, 88 N. Y. Supp. 986; *Fitzgerald v. Atlanta Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp. 552; *Wright v. Insurance Co.*, 12 Mont. 474, 31 Pac. Rep. 87.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 26.

TITLE VI.

Foreclosure or Notice of Sale.

- RULE
1. As imposed by contract.
 2. Violation of condition voids policy.
 3. Effect upon moral risk — What regarded as commencement of proceedings.
 4. Knowledge of insured — Commencement.
 5. Provision has reference to future — Condition subsequent.
 6. Mortgagee protected by mortgagee clause.

- RULE 7.** Policy void as to both insured owner and mortgagee to whom loss payable.
8. Effect of making loss payable to mortgagee.
 9. Action by mortgagee to whom loss is made payable.
 10. To what foreclosure proceedings refer.
 11. Effect of making loss payable to third party.
 12. Proceedings mean judicial proceedings.
 13. Effect of advertising for sale under deed of trust.
 14. Meaning and application of the phrase "notice given of sale."
 15. Waiver or estoppel when policy issues.
 16. No waiver after issue of policy.
 17. When insured not bound by notice of limitation upon agent's authority.
 18. Omission to cancel as evidence of estoppel.
 19. Insured must be misled as element of estoppel.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island,
New Jersey,	Wisconsin.

The standard form of policy prescribed in Michigan is the same, except there is added: "Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss."

* See note to "Concealment," Rule 1, page 2.

The standard form of policy prescribed in :

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain above provision.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

Under the old forms which provided that upon "the passing or entry of a decree of foreclosure" policy should become void, it was held that the commencement of foreclosure proceedings did not violate the condition.

Minnock v. Eureka Ins. Co., 90 Mich. 236, 51 N. W. Rep. 367; *Pearman v. Gould*, 15 Stew. Eq. 4 (N. J.).

When notice was required under the old forms, it was held that the insured was entitled to a reasonable time in giving it.

Michigan Ins. Co. v. Lewis, 30 Mich. 41.

An advertisement and sale under power in a mortgage was not equivalent of entry of decree in foreclosure.

Hanover Ins. Co. v. Brown, 77 Md. 64, 76, 25 Atl. Rep. 989, rehearing denied, 27 Atl. Rep. 314.

But an advertisement of sale voided the policy when condition so specifically provided.

Pearson v. German Ins. Co., 73 Mo. App. 480.

When policy provided that it should be void, "if property be or become involved in litigation," it was held that foreclosure was not covered by the condition.

Farmers' Ins. Co. v. Newman, 58 Nebr. 504, 78 N. W. Rep. 933.

When the policy in terms provides that if "suit for foreclosure, in which title, ownership, or possession of the property insured is involved, be instituted," it shall be void; if only a part of the property is affected by such a suit, no forfeiture results.

Fitzgibbons v. Merchants' Ins. Co., Iowa, , 101 N. W. Rep. 454.

RULE 2.

Violation of Condition Voids Policy.

Commencement of foreclosure proceedings voids the policy according to its terms.

Springfield Steam Laundry Co. v. Traders' Ins. Co., 151 Mo. 90, 52 S. W. Rep. 238, 28 Ins. L. J. 760; *Hayes v. United*

States Ins. Co., 132 N. C. 702, 44 S. E. Rep. 404; Gibson Electric Co. *v.* Liverpool, L. & G. Ins. Co., 159 N. Y. 418, 54 N. E. Rep. 23, 28 Ins. L. J. 629; Woodside Brewing Co. *v.* Pacific Ins. Co., 11 App. Div. 68, 42 N. Y. Supp. 620, *aff'd*, 159 N. Y. 549, on opinion below; Quinlan *v.* Providence-Washington Ins. Co., 133 N. Y. 356, 31 N. E. Rep. 31; Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410; Meadows *v.* Hawkeye Ins. Co., 62 Iowa, 387, 13 Ins. L. J. 377; Armstrong *v.* Agricultural Ins. Co., 130 N. Y. 560, 29 N. E. Rep. 991; Hartford Ins. Co. *v.* Clayton, 17 Tex. Civ. App. 644, 43 S. W. Rep. 910; Merchants' Ins. Co. *v.* Brown, 77 Md. 79, 25 Atl. Rep. 992.

RULE 3.

Effect Upon Moral Risk — What Regarded as Commencement of Proceedings.

The moral risk is universally recognized as an important consideration in determining the business of a company, and it is clear that this risk is increased when the default of the insured has resulted in proceedings to foreclose his equity. The service of the petition upon the insured must be regarded as the commencement of such proceedings.

Findlay *v.* Union Ins. Co., 74 Vt. 211, 52 Atl. Rep. 429.

RULE 4.

Knowledge of Insured — Commencement.

When the policy requires knowledge by the insured of the commencement of foreclosure proceedings, such knowledge must be shown or be established to render the condition operative in voiding the policy;¹ the condition does not mean that the insured must know of suit at or before commencement; delivery of process to a sheriff may be the equivalent of commencement, but, so far as knowledge of the insured is concerned, commencement is by service on the defendant, and for-

feiture takes effect when service is made.² When a statute defines commencement as the filing of a petition, the mere service of a citation conveys no knowledge of the filing of the petition.³

1. *North British & M. Ins. Co. v. Freeman*, Tex. Civ. App., 33 S. W. Rep. 1091; *London & Lancashire Ins. Co. v. Davis*, Tex. Civ. App., 84 S. W. Rep. 260; *Bellevue Roller Mill Co. v. London & Lancashire Ins. Co.*, 4 Idaho, 307, 39 Pac. Rep. 196, 24 Ins. L. J. 331.

2. *Norris v. Hartford Ins. Co.*, 55 S. C. 450, 33 S. E. Rep. 566, 28 Ins. L. J. 747; *Schroeder v. Imperial Ins. Co.*, 132 Cal. 18, 63 Pac. Rep. 1074. And see *Sharp v. Scottish Union Ins. Co.*, 136 Cal. 542, 69 Pac. Rep. 253, 615.

3. *London & Lancashire Ins. Co. v. Davis*, Tex. Civ. App., 84 S. W. Rep. 260.

RULE 5.

Provision Has Reference to Future — Condition Subsequent.

The condition has no application to proceedings pending when the policy issues; it has reference only to the future.

Orient Ins. Co. v. Burrus, 63 S. W. Rep. 453 (Ky.); *Coolledge v. Continental Ins. Co.*, 67 Vt. 14, 30 Atl. Rep. 798, question raised but not decided in *Benjamin v. Palatine Ins. Co.*, 80 App. Div. 260, 80 N. Y. Supp. 256, aff'd, 177 N. Y. 588, on opinion below. And see *Day v. Hawkeye Ins. Co.*, 72 Iowa, 597, 34 N. W. Rep. 435.

RULE 6.

Mortgagee Protected by Mortgagee Clause.

The condition is inoperative as against a mortgagee, to whom the loss is made payable under the terms of a mortgagee clause.

Sun Ins. Office v. Beneke, 53 S. W. Rep. 98 (Tex. Civ. App.). And see Vol. 1, *Fire Insurance as a Valid Contract*, "Mortgagor and Mortgagee."

RULE 7.

Policy Void as to Both Insured Owner and Mortgagee to Whom Loss Payable.

Unless otherwise provided by agreement, or a mortgagee clause, the policy is rendered void both as to the insured owner and mortgagor and a mortgagee to whom the loss is made payable as interest may appear, if foreclosure proceedings are instituted against the mortgagor, and the latter knows that they have been commenced at any time before the fire, which causes the loss, occurs.

Delaware Ins. Co. *v.* Greer, 120 Fed. Rep. 916, 57 C. C. A. 188, 61 L. R. A. 137.

RULE 8.

Effect of Making Loss Payable to Mortgagee.

A sale of the property insured under a judgment in foreclosure to the mortgagee, to whom the loss in the policy is made "payable as interest may appear," voids the insurance as to both the insured and the mortgagee. The indorsement making loss payable to the mortgagee gives him no right to recover, as his interest has been merged in the perfect legal title, and he can have no greater right than the insured, and, being void by his violation of the conditions, it is void as to the mortgagee. The fact that the mortgagee purchases under an agreement with the wife of the insured, that she could redeem, does not continue the insurance for her benefit, as she is a stranger to the insurance contract.

McKinney *v.* Western Assur. Co., 97 Ky. 474, 30 S. W. Rep. 1004.

And see Vol. 1, Fire Insurance as a Valid Contract, "Mortgagor and Mortgagee."

RULE 9.

Action by Mortgagee to Whom Loss is Made Payable.

Commencement of foreclosure proceedings by a mortgagee to whom the loss is made payable does not void the policy, when there is no provision therein making the conditions therein expressed as to the insured applicable to the mortgagee.

Henton v. Farmers' Ins. Co., Nebr. , 95 N. W. Rep. 670.

And see Vol. 1, Fire Insurance as a Valid Contract, "Mortgagor and Mortgagee," Rules 10 and 20.

RULE 10.

To What Foreclosure Proceedings Refer.

The condition does not apply to proceedings to enforce a vendor's lien or to foreclosure of such a lien;¹ issue of a "*scire facias*" by a mortgagee is not foreclosure within the meaning of the policy;² proceedings to sell by execution on a judgment given to secure the same debt, as by a prior mortgage, are not proceedings in foreclosure;³ "foreclosure proceedings" do not refer to proceedings to enforce a mechanic's lien,⁴ nor to enforcement of a statutory lien of lumbermen.⁵

1. Insurance Cos. v. Estes, 106 Tenn. 472, 62 S. W. Rep. 149, 52 L. R. A. 915.

2. Weiss v. American Ins. Co., 148 Pa. St. 349, 23 Atl. Rep. 991.

3. Collins v. London Assur. Co., 165 Pa. St. 298, 30 Atl. Rep. 924, 24 Ins. L. J. 658.

4. Colt v. Phoenix Ins. Co., 54 N. Y. 595.

5. Speagle v. Dwelling-House Ins. Co., 97 Ky. 646, 31 S. W. Rep. 282, 24 Ins. L. J. 829.

RULE 11.**Effect of Making Loss Payable to Third Party.**

An indorsement after issue of the policy upon both real and personal property, making the loss, if any, payable to a third party as interest may appear, is not sufficient to show the assent of an insurance company to a chattel mortgage, and the knowledge of the company's agent of the existence of the chattel mortgage will not avail, when such third party, to whom the loss is made payable, holds a mortgage on the real property in addition to the chattel mortgage.

Atlas Reduction Co. v. New Zealand Ins. Co., 121 Fed. Rep. 929.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to Fire Insurance Contract."

RULE 12.**Proceedings Mean Judicial Proceedings.**

Commencement of foreclosure proceedings means judicial proceedings; waivers of delays and of legal formalities by the insured may have the effect of facilitating foreclosure proceedings, but they do not of themselves constitute such proceedings; commencement of such proceedings is by suit.

Stenzel v. Pennsylvania Ins. Co., 110 La. 1019, 35 So. Rep. 271.

RULE 13.**Effect of Advertising for Sale Under Deed of Trust.**

An advertisement of insured property for sale under a deed of trust is the commencement of foreclosure

proceedings, within the meaning of the terms of the policy;¹ so notice of sale under a deed of trust voids the policy.²

1. *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. Rep. 238, 28 Ins. L. J. 760.

2. *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101.

RULE 14.

Meaning and Application of the Phrase "Notice Given of Sale."

The phrase in the condition, "or notice given of the sale of any property," etc. (see Rule 1), means that the policy shall be void if the insured confers upon the mortgagee the right to enforce the mortgage extrajudicially, by merely giving notice of sale, and the mortgagee proceeds to enforce the mortgage in that manner, and is inoperative in a State where such a mode of enforcing mortgages is unknown.

Stenzel v. Pennsylvania Ins. Co., 110 La. 1019, 35 So. Rep. 271.

RULE 15.

Waiver or Estoppel When Policy Issues.

The knowledge of the company's agent who issued the policy that foreclosure proceedings were actually pending at the time estops the company from setting up the pendency of such proceedings as a defense to a claim under the policy;¹ and so the company may be bound by the knowledge of its soliciting agent in taking application for the insurance;² but mere knowledge of the existence of the mortgage, and that the debt would mature during the life of the policy, does not

affect the condition, and cannot be construed as a waiver,³ nor does the company's consent to a mortgage operate as a consent to foreclosure proceedings.⁴

1. *Benjamin v. Palatine Ins. Co.*, 80 App. Div. 260, 80 N. Y. Supp. 256, aff'd, 177 N. Y. 588, on opinion below; *Vesey v. Commercial Union Assur. Co.*, S. D. , 101 N. W. Rep. 1074; *Cronin v. Fire Assoc.*, 119 Mich. 74, 77 N. W. Rep. 648. And see *Miller v. Scottish Union & National Ins. Co.*, 101 Mich. 49, 59 N. W. Rep. 439, 23 Ins. L. J. 725.

2. *Farmers & Merchants' Ins. Co. v. Wiard*, 59 Nebr. 451, 81 N. W. Rep. 312.

3. *Hartford Ins. Co. v. Clayton*, 17 Tex. Civ. App. 644, 43 S. W. Rep. 910.

4. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410. But see and compare *Butz v. Ohio Farmers' Ins. Co.*, 76 Mich. 263, 42 N. W. Rep. 1119.

RULE 16.

No Waiver After Issue of Policy.

When the restrictions upon the agent's authority appear in the policy, in the absence of evidence tending to show that his powers have been enlarged by the company, the authority expressed in the policy operates as the measure of his power, and when the policy provides that he has power only to waive by written agreement indorsed thereon or added thereto, a verbal notice to the agent or verbal consent by him after the policy issues is not sufficient to prevent the policy from becoming void according to its terms;¹ mere failure or omission of the company to reply to a letter asking for consent to such proceedings does not operate as a waiver or estoppel.²

1. *Woodside Brewing Co. v. Pacific Ins. Co.*, 11 App. Div. 68, 42 N. Y. Supp. 620, aff'd, 159 N. Y. 549, on opinion below; *Moore v. Hanover Ins. Co.*, 141 N. Y. 219, 36 N. E. Rep. 191, 23 Ins. L. J. 466; *Armstrong v. Agricultural Ins.*

Co., 130 N. Y. 560, 29 N. E. Rep. 991, 21 Ins. L. J. 431; Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. Rep. 101.

2. *Armstrong v. Agricultural Ins. Co., supra.*

RULE 17.

When Insured not Bound by Notice of Limitation upon Agent's Authority.

When the company's agent, on issue of policy, indorses written consent to foreclosure proceedings, and delivers the policy so indorsed to the agent procuring it, who delivers it to the insured without notice or knowledge on his part of any limitation upon the agent's authority to make such indorsement, the insured is not bound by any verbal notice to the agent who procured the policy that the agent who made the indorsement did so contrary to his orders or instructions.

Miller v. Scottish Union & National Ins. Co., 101 Mich. 49, 59 N. W. Rep. 439, 23 Ins. L. J. 725.

RULE 18.

Omission to Cancel as Evidence of Estoppel.

In some of the States the rule appears to be that, if the company or its agent acquires knowledge of the commencement of foreclosure proceedings, its omission or failure to cancel the policy and return the unearned premium may be an element or evidence of waiver or estoppel.

Horton v. Home Ins. Co., 122 N. C. 498, 29 S. E. Rep. 944; *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90, 52 S. W. Rep. 238, 28 Ins. L. J. 760.

See Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 30, and note. And see this volume, "Cancellation."

RULE 19.

Insured Must be Misled as an Element of Estoppel.

If policy is void at time of the fire on account of the commencement of foreclosure proceedings, a statement by the company's agent or officer that it would not rely upon the condition does not operate to revive it; nor does it operate as a waiver or estoppel when the insured is not thereby induced to omit anything to his detriment.

Findlay v. Union Ins. Co., 74 Vt. 211, 52 Atl. Rep. 429.

As to waiver or estoppel, see also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," and this volume, chapter on "Agents."

TITLE VII.**Change in Interest, Title, or Possession.**

- RULE**
1. As imposed by contract.
 2. Provision material and reasonable — Enforced.
 3. Condition subsequent — Burden of proof.
 4. Distinction between interest and title — Partnership — When no distinction.
 5. Meaning of the word "interest" — Interest in land.
 6. Effect of written description.
 7. Notice of change not sufficient — Duty of insured to procure written consent.
 8. Application of clause "except change of occupants without increase of hazard" — Question of fact.
 9. Meaning of "sale or transfer."
 10. Change of title increasing interest.
 11. Effect of insured parting with all his interest — Application of the word "interest."
 12. Effect of consent to change in interest.
 13. Construction of word "sold" in Massachusetts standard form.
 14. Legal process to effect change in possession must be valid.
 15. No change in transfer of legal title to beneficial owner.
 16. Effect of consent to transfer — Cannot claim instrument void.

- RULE 17. Sale or mortgage of stocks of merchandise — Sale of same in bulk — Change in partnership.
18. Sale or transfer by one partner to another partner — Parties insured may transfer as between themselves — Dissolution — Death — Taking in third party as partner.
19. Effect of taking in partner with interest in profits only.
20. Executory agreement between partnership insured and third parties to form corporation — Change from partnership to limited liability company.
21. Change by mortgage — Meaning of change — Title or possession — Interest.
22. Chattel mortgage — Parol evidence — Chattel mortgage by one partner on firm property for individual benefit.
23. Bill of sale must be delivered and accepted.
24. Effect of executory contract of sale.
25. Executory contract for sale and exchange of stock or goods.
26. Change by deed — Delivery and acceptance — Record — Void deed.
27. Attornment of tenant to purchaser.
28. Judicial sale — Redemption — Confirmation.
29. Sale of real estate on execution — Redemption.
30. Partition — Sale — Confirmation.
31. Sale under deed of trust — Confirmation.
32. Levy by sheriff — Attachment — Possession by sheriff.
33. Appointment of receiver — Receiver of partnership — Change of receiver.
34. Void sale — Insured continuing in possession.
35. Effect of adjudication in bankruptcy.
36. Waiver or estoppel when policy issues.
37. Waiver or estoppel after issue of policy.
38. Effect of consent to assignment of policy.
39. Effect of making loss payable to third party.
40. Contract divisible.
41. When contract not divisible.
42. What is a change — Illustrative cases.
43. What is not a change — Illustrative cases.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be

void if any change, other than by death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island,
New Jersey,	Wisconsin.

The standard form of policy prescribed in Michigan is the same, except there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues or such breach of condition is the primary or contributory cause of the loss.”

The standard form of policy prescribed in:

Maine,	Massachusetts,
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provides: “this policy shall be void if without the assent in writing or in print of the company, the said property shall be sold.”

The standard form of policy prescribed in Minnesota provides: “the policy shall be void, if without the assent of the company the property shall be sold.”

The standard form of policy prescribed in New Hampshire provides: “this policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: * * * if, without the assent in writing or in print, of the company the said property shall be sold.” It is furthermore provided by statute made part of the policy: “change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, shall not affect the policy except while the change or breach continues.”

* See note to “Concealment,” Rule 1, page 2.

The standard form of policy prescribed in South Dakota provides: "this policy shall be void if without the assent of the company the insured shall sell and dispose of all insurable interests in the insured property."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

Section 3643 of the Ohio Revised Statutes providing "that any company insuring a building, shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made and the insurable value thereof to be fixed by such agent; and that in the absence of any change increasing the risk without the consent of the company, and also an intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal shall be paid," has no application to defenses founded upon specific conditions as to title but is limited in operation to a building itself, its condition and situation as regards surrounding objects and its value; and the word "change" must be confined in its reference to the same and to those matters which were open to the sight and observation of the agent.

Webster v. Dwelling-House Ins. Co., 53 Ohio St. 558, 7 Ohio C. C. 511.

See Statutory Provisions Ohio, Vol. 1, Fire Insurance as a Valid Contract.

Many of the old forms contained a clause or condition which in terms provided against a change by "an incumbrance." This specific language was omitted from the standard forms, and the decisions thereunder under the changed language are of doubtful application. To those interested, however, reference might be made to *Brown v. Commonwealth Ins. Co.*, 41 Pa. St. 187; *Supple v. Iowa State Ins. Co.*, 58 Iowa, 29; *Nassauer v. Susquehanna Ins. Co.*, 109 Pa. St. 507; *Kister v. Lebanon Ins. Co.*, 128 Pa. St. 553; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570, 19 Atl. Rep. 793; *Dwelling-House Ins. Co. v. Hoffman*, 125 Pa. St. 626, 18 Atl. Rep. 397; *Phoenix Ins. Co. v. Lorenz*, Ind. , 29 N. E. Rep. 604, 33 N. E. Rep. 444; *Stevens v. Queens Ins. Co.*, 81 Wis. 335, 51 N. W. Rep. 555, 21 Ins. L. J. 443; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. Rep. 34; *Bosworth v. Cleary*, 80 Wis. 393, 49 N. W. Rep. 750; *Hogue v. Farmers' Ins. Co.*, Wis. , 93 N. W. Rep. 849; *Martin v. Farmers' Ins. Co.*, 84 Iowa, 516, 51 N. W. Rep. 516; *Hicks v. Farmers' Ins. Co.*, 71 Iowa, 119, 32 N. W. Rep. 201; *Campbell v. Hamilton Ins. Co.*, 51 Me. 69; *Mallory v. Farmers' Ins. Co.*, 65 Iowa, 450; *Allen v. Hudson River Ins. Co.*, 19 Barb.

442; *Olmstead v. Iowa Ins. Co.*, 24 Iowa, 503; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216; *Mowry v. Agricultural Ins. Co.*, 64 Hun, 137 (N. Y.); *Phoenix Ins. Co. v. Hart*, 39 Ill. App. 517; *Johansen v. Home Ins. Co.*, 54 Nebr. 548, 74 N. W. Rep. 866, 27 Ins. L. J. 610.

A mortgage which has been paid, though not discharged of record, is no incumbrance.

Merrill v. Agricultural Ins. Co., 73 N. Y. 452; *New Orleans Ins. Assoc. v. Holberg*, 64 Miss. 51; *Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673, 39 N. W. Rep. 86. And a void mortgage is no incumbrance. *Watertown Ins. Co. v. Grover & Baker Sewing Machine Co.*, 41 Mich. 131; *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553. A mechanic's lien is an incumbrance. *Redmon v. Phoenix Ins. Co.*, 51 Wis. 292. Some forms required "notice of incumbrance or levy." *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St. 151; *McCann v. Waterloo County Ins. Co.*, 34 Up. Can. Q. B. 376; *Tarbell v. Vermont Ins. Co.*, 63 Vt. 53, 22 Atl. Rep. 533, 21 Ins. L. J. 238; *Seybert v. Penn Ins. Co.*, 103 Pa. St. 282; *Pennsylvania Ins. Co. v. Schmidt*, 119 Pa. St. 449, 13 Atl. Rep. 317.

Under these forms a judgment was held to be an incumbrance. *Kensington Nat. Bank v. Yerkes*, 86 Pa. St. 227; *Hench v. Agricultural Ins. Co.*, 122 Pa. St. 128, 15 Atl. Rep. 671; *Bowman v. Franklin Ins. Co.*, 40 Md. 620, only when a lien; *Smith v. Continental Ins. Co.*, 108 Iowa, 382, 79 N. W. Rep. 126, 28 Ins. L. J. 534.

But it was also held that the condition referred to incumbrances created by act of the insured and had no application to incumbrance by judgment, or otherwise created by operation of law.

Baley v. Homestead Ins. Co., 80 N. Y. 21; *Green v. Homestead Ins. Co.*, 82 N. Y. 517; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. Rep. 546; *Phoenix Ins. Co. v. Smith*, 9 Kans. App. 828, 61 Pac. Rep. 501. And see *Georgia Home Ins. Co. v. Jones*, 49 Miss. 80.

And see this volume, title "Chattel Mortgage."

It is also held that the incumbering of a part of the property does not void the entire policy.

Born v. Home Ins. Co., 110 Iowa, 379, 81 N. W. Rep. 676.

A renewal of an existing mortgage is not a breach of a condition against mortgaging.

Dougherty v. German-Amer. Ins. Co., 67 Mo. App. 526.

Some of the old forms provided that "if the title or possession be now or hereafter involved in litigation" and it was held

to relate to title and possession of the insured, and had no application to proceedings to oust a tenant.

Hall *v.* Niagara Ins. Co., 93 Mich. 184, 53 N. W. Rep. 727.

Others provided that policy should be void "if any action or proceeding be commenced affecting the title to property insured," and it was held that the commencement of the foreclosure of a mechanic's lien worked a forfeiture without regard to the validity of the lien.

Smith *v.* St. Paul F. & M. Ins. Co., 106 Iowa, 225, 76 N. W. Rep. 676.

RULE 2.

Provision Material and Reasonable — Enforced.

The provision is material, as it contemplates the moral risk which experience shows is not the same with all persons, and which may change with a change of circumstances;¹ and is enforced by the courts.²

1. Northam *v.* Dutchess County Ins. Co., 166 N. Y. 319, 59 N. E. Rep. 912.

2. Jaskulski *v.* Citizens' Ins. Co., 131 Mich. 603, 92 N. W. Rep. 98; Home Ins. Co. *v.* Collins, 61 Nebr. 198, 85 N. W. Rep. 54; Cummins *v.* National Ins. Co., 81 Mo. App. 291; Rosenstein *v.* Traders' Ins. Co., 79 App. Div. 481, 79 N. Y. Supp. 736; Ehram Machine Co. *v.* Phoenix Ins. Co., 43 Nebr. 554, 61 N. W. Rep. 722, 24 Ins. L. J. 316. And see Campbell *v.* German Ins. Co., 31 S. W. Rep. 310 (Tex.).

RULE 3.

Condition Subsequent — Burden of Proof.

The condition applies only to the facts occurring after or subsequent to the issue of the policy;¹ and want of consent to a change claimed to void the insurance must be pleaded and proved by the company.²

1. Cowart *v.* Capital Ins. Co., 114 Ala. 356, 22 So. Rep. 574, 27 Ins. L. J. 246; Morotock Ins. Co. *v.* Rodefer, 92 Va. 747, 24 S. E. Rep. 393, 25 Ins. L. J. 529.

2. Peoria F. & M. Ins. Co. *v.* Lewis, 18 Ill. 553. And see Orrell *v.* Hampden Ins. Co., 13 Gray, 431 (Mass.).

RULE 4.

Distinction Between Interest and Title — Partnership — When no Distinction.

Under the changed language of the standard forms the word “ interest ” means something different from the word “ title,” and is not used synonymously with it; it includes both legal and equitable rights,¹ though in case of a partnership the condition applies only to a legal transfer, which divests the insured partnership of title to or control over the property,² and as to the owner of property there may be no distinction between his interest and title.³

1. *Skinner Ship Building Co. v. Houghton*, 92 Md. 68, 48 Atl. Rep. 85; *Southern Cotton Oil Co. v. Prudential Fire Assoc.*, 78 Hun, 373, 29 N. Y. Supp. 128; *Arkansas Ins. Co. v. Wilson*, 67 Ark. 553, 55 S. W. Rep. 933; *Gibb v. Philadelphia Ins. Co.*, 59 Minn. 267, 61 N. W. Rep. 137, 24 Ins. L. J. 313; *Excelsior Foundry Co. v. Western Assur. Co.*, Mich. , 98 N. W. Rep. 9.

2. *Wood v. American Ins. Co.*, 149 N. Y. 382, 44 N. E. Rep. 80, aff'g 78 Hun, 109, 29 N. Y. Supp. 250 (Gray, J., dissenting on ground of a change in *interest*). And see *Hanover Ins. Co. v. Brown*, 77 Md. 64, 27 Atl. Rep. 314.

3. *Tiemann v. Citizens' Ins. Co.*, 76 App. Div. 5, 78 N. Y. Supp. 620. And see *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375, 32 N. E. Rep. 1063, 22 Ins. L. J. 81.

RULE 5.

Meaning of the Word “ Interest ” — Interest in Land.

The word “ interest ” means a legal interest, and has the same meaning as “ right, title, and interest.” It means proprietary or an insurable interest. The condition does not contemplate or intend a mere sentimental interest. When the insured continues to be the sole and exclusive owner and possessor of the

property insured, there is no change within the meaning of the policy.¹ The word "interest" is not used in the sense of an insurable interest, and merely because some third party acquires a possible insurable interest it does not necessarily effect a change in that insured. No one has an interest in land unless he has some kind of property in it, either legal or equitable.²

1. *Stenzel v. Pennsylvania Ins. Co.*, 110 La. 1019, 35 So. Rep. 271.

2. *Moseley v. Northwestern Nat. Ins. Co.*, Mo. App. , 84 S. W. Rep. 1000.

RULE 6.

Effect of Written Description.

When the written or descriptive part of the policy shows an intention to cover and protect other interests besides that of a party or individual specifically named, the condition against any change of interest is inoperative because it is otherwise provided.

Hagan v. Scottish Ins. Co., 186 U. S. 423, 22 Sup. Ct. Rep. 862, rev'g 102 Fed. Rep. 919, 43 C. C. A. 55.

RULE 7.

Notice of Change not Sufficient — Duty of Insured to Procure Written Consent.

It is not sufficient to give notice to the insurance company of the transfer or change; if the policy requires consent in writing to be indorsed it must be obtained and indorsed or attached, and the duty of procuring these things to be done rests with the insured. If he fails in his efforts or neglects to comply with the requirements of the policy it is at an end by force of its own terms;¹ but when notice only is re-

quired, consent may be implied from failure of the company to dissent on receiving such notice.²

1. *Girard Ins. Co. v. Hebard*, 95 Pa. St. 45, 10 Ins. L. J. 425. And see *Tarbell v. Vermont Ins. Co.*, 63 Vt. 53, 22 Atl. Rep. 533.

2. *Brown v. Commonwealth Ins. Co.*, 41 Pa. St. 187.

RULE 8.

Application of Clause "Except Change of Occupants Without Increase of Hazard" — Question of Fact.

The parenthetical clause in the condition, "except change of occupants without increase of hazard," is not limited in its application to buildings or real property. It applies also to personal property, and the phrase in question includes the place where goods insured are situated, and the agreement is in substance that, in case the possession of goods is changed, that fact alone does not void the policy, unless the occupancy of the place where they are is also changed so as to become more hazardous; and this is a question of fact for a jury.

Walradt v. Phoenix Ins. Co., 136 N. Y. 375, 32 N. E. Rep. 1063, 22 Ins. L. J. 81.

And that the exception applies to insurance of personal property, title to stocks of merchandise as well as to realty.

See also *Herman v. Katz*, 101 Tenn. 118, 47 S. W. Rep. 86, 41 L. R. A. 700.

RULE 9.

Meaning of "Sale or Transfer."

Under the old forms, which provided that "when the property has been sold and delivered, or otherwise disposed of so that all interest or liability on the part of the insured has ceased, the insurance shall termi-

nate," the language means a legal transfer which divests the party of title or control over the property;¹ and even under the modern forms a "sale or transfer" means such transfer as divests the insured of all his interest,² and taking a partner in the business is not a sale or transfer of the entire interest in the property.³

1. *Browning v. Home Ins. Co.*, 71 N. Y. 508, aff'g 6 Daly, 522. And see *Scanlon v. Union Ins. Co.*, 4 Biss. 511 (U. S. Cir.); *Manley v. Insurance Co. N. A.*, 1 Lans. 20 (N. Y.).

2. *Commercial Union Assur. Co. v. Scammon*, 123 Ill. 601, 12 N. E. Rep. 324; *Blackwell v. Miami Valley Ins. Co.*, 48 Ohio St. 533, 29 N. E. Rep. 278, 21 Ins. L. J. 97; *Hennesey v. Manhattan Ins. Co.*, 28 Hun, 98 (N. Y.). And see *Sovereign Ins. Co. v. Peters*, 12 Duval, 33 (Can. Sup.).

3. *Blackwell v. Miami Valley Ins. Co.*, *supra*.

Some of the old forms provided "in case of any transfer or termination of the interest of the assured in this policy, either by sale or otherwise" policy should be void, and it was held that nothing short of a termination or parting with the entire interest could work a forfeiture.

Holbrook v. American Ins. Co., 1 Curt. 193 (U. S. Cir.).

RULE 10.

Change of Title Increasing Interest.

A change of title which increases the interest of the insured, whether by sale under judicial decree or by voluntary conveyance, is not such change as to defeat the insurance.

Continental Ins. Co. v. Ward, 50 Kans. 346, 22 Ins. L. J. 373, 31 Pac. Rep. 1079. And see *Dodge v. Hamburg-Bremen Ins. Co.*, 4 Kans. App. 415, 46 Pac. Rep. 25, 23 Ins. L. J. 255; *Wich v. Equitable Ins. Co.*, 2 Colo. App. 484, 31 Pac. Rep. 389; *Heaton v. Manhattan Ins. Co.*, 7 R. I. 502; *Bailey v. American Central Ins. Co.*, 13 Fed. Rep. 250; *Diehlman v. Dwelling-House Ins. Co.*, 78 Mich. 141, 19 Ins. L. J. 256; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. Rep. 229, 19 Ins. L. J. 113.

RULE 11.

Effect of Insured Parting with All His Interest — Application of the Word "Interest."

If the insured sells the subject of the insurance or property, and parts with all his interest therein before the occurrence of any loss, the insurance or policy ends, unless assigned to the purchaser with consent of the insurance company;¹ so when the policy in terms provides that it shall "cease on termination of the interest of the insured," such condition refers to an absolute termination of interest and not to a mere temporary alienation, and if the interest existed when policy was obtained, and also at time of loss, insured is entitled to recover;² the word "interest" refers to the interest in the property insured, and not in the mere contract of insurance.³

1. *Ætna Ins. Co. v. Tyler*, 16 Wend. 385 (N. Y.); *Wilson v. Hill*, 3 Metc. 66 (Mass.); *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *Manley v. Insurance Co. N. A.*, 1 Lans. 20 (N. Y.); *Lahiff v. Ashuelot Ins. Co.*, 60 N. H. 75, 13 Ins. L. J. 796; *Langdon v. Minnesota Ins. Co.*, 22 Minn. 193; *Lett v. Guardian Ins. Co.*, 125 N. Y. 82, 25 N. E. 1088, 20 Ins. L. J. 176; *Macarty v. Commercial Ins. Co.*, 17 La. 365; *New v. German Ins. Co.*, Ind., 31 N. E. Rep. 475, 21 Ins. L. J. 754; *Wilson v. Hill*, 3 Metc. 66 (Mass.). And see *Jerdee v. Cottage Grove Ins. Co.*, 75 Wis. 345, 44 N. W. Rep. 636, 19 Ins. L. J. 519.

2. *Power v. Ocean Ins. Co.*, 19 La. 28.

3. *Carpenter v. Washington Ins. Co.*, 16 Pet. 495 (U. S.). And see *Lahiff v. Ashuelot Ins. Co.*, *supra*.

This rule may be operative independent of Rule 1, or other conditions of the policy.

See "Insurable Interest."

RULE 12.

Effect of Consent to Change in Interest.

If the insurance company consents to a change in the interest of the insured, it operates substantially to

create a new contract of insurance between the parties, whereby the old policy covers the interest as changed and consented to.

Benjamin v. Saratoga Ins. Co., 17 N. Y. 415; *Collins v. Charlestown Ins. Co.*, 10 Gray, 155 (Mass.). And see *Buckley v. Garrett*, 47 Pa. St. 204; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435; *Gilliat v. Pawtucket Ins. Co.*, 8 R. I. 282.

RULE 13.

Construction of Word "Sold" in Massachusetts Standard Form.

Under the language of the Massachusetts standard form, providing that the policy shall become void if "the property be *sold*," a sale which does not operate as an absolute transfer of the entire interest of the insured, completely divesting him of his insurable interest, is not within the scope of the condition;¹ and so in Maine the sale must be such as to pass the title.²

1. *Clinton v. Norfolk Ins. Co.*, 176 Mass. 486, 57 N. E. Rep. 998 (the court in its opinion points out the different results owing to change or difference in language). And see *Stuart v. Reliance Ins. Co.*, 179, Mass. 434, 60 N. E. Rep. 929.

2. *International Wood Co. v. National Assur. Co.*, Me., 59 Atl. Rep. 544.

The opinion of the court in *Clinton v. Norfolk Ins. Co.*, in pointing out the different results owing to change or difference in language, is so valuable as to warrant its insertion. The court says:

"Many of the earlier policies of fire insurance contained no condition against alienation. Inasmuch, however, as the contract of insurance is one of indemnity and not a wager, it is manifest that where, before the fire, the insured had parted with his entire interest in the property insured, he suffered no loss by its destruction and needed no indemnity. A total transfer of his interest, therefore, defeated the policy. But any change short of a complete transfer of his entire interest did not have that effect. The general rule was and is, that, in the absence of any provision to the contrary in the policy, any change

in the insurable interest of the insured, whether by a complete sale of only a part of the property, or a change in the title to a part or the whole of the property, does not avoid the policy which has once attached, provided that at the time of the loss the insured has an insurable interest. It is necessary that there should be an insurable interest at the time of the contract and at the time of the loss, but if at the time of the loss the insured has parted with only a part of his interest, the policy is valid as to the part retained. *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76 (Mass.); *Scanlon v. Union Ins. Co.*, 4 Biss. 511; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551; *Stetson v. Massachusetts Ins. Co.*, 4 Mass. 330; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68. And see further the cases cited in 13 Am. & Eng. Encyc. of Law (2d ed.), 240, and notes. And even a total alienation does not avoid, but only suspends the policy, so that if the insured regain his interest or any part of it, and holds it at the time of the loss, he may recover. *May Ins.*, § 101; *Worthington v. Bearse*, 12 Allen, 382.

"In this state of the law insurers began to insert in the policies clauses relating to alienation. These clauses vary in language, and in the examination of the cases on this subject considerable care must be exercised in order to discriminate properly between those cases applicable and those not applicable to the clause which may be under consideration.

"The clause in this policy is if 'the said property shall be sold.' Conditions of this kind are strictly construed against the insurer, and the general rule is that such condition refers only to an absolute transfer of the entire interest of the insured, completely divesting him of his insurable interest. Any sale or transfer short of this is not within the scope of the condition. See, in addition to the cases above cited, *Bryan v. Traders' Ins. Co.*, 145 Mass. 389; *Holbrook v. American Ins. Co.*, 1 Curtis C. C. 193; *Power v. Ocean Ins. Co.*, 19 La. 28; and the cases collected in 13 Am. & Eng. Encyc. of Law (2d ed.), 241, and notes.

"If it be the intention of the insurers that the contract should be avoided by any partial sale, or by any change short of an absolute sale of the entire interest, there is no difficulty in expressing that intent in plain and explicit language, and in many policies such an intention is thus expressed. See *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 164, where the condition was that the policy should be void if the property insured should be sold or conveyed in whole or in part.

"As an illustration of the different results arising from the

difference in the language of the clauses as to alienation compare the case of *Foot v. Hartford Ins. Co.*, 119 Mass. 259, and *Bryan v. Traders' Ins. Co.*, *ubi supra*. In the former case, where the condition was that the policy should be void if any change should take place in the title or possession of the property insured, whether by sale, transfer, or conveyance, legal process or judicial decree, it was held that a mortgage by way of an absolute deed and an unrecorded instrument of defeasance back was a violation of the condition, while in the latter case it was held that such a mortgage did not avoid the policy where the condition was that the policy should be avoided if "the said property shall be sold."

RULE 14.

Legal Process to Effect Change in Possession Must be Valid.

If it is claimed that there has been a change in possession by legal process, such legal process must be valid.

Runkle v. Citizens' Ins. Co., 6 Fed. Rep. 143, 11 Ins. L. J. 94.

RULE 15.

No Change in Transfer of Legal Title to Beneficial Owner.

When policy is issued to and in the name of a president of a railroad company, by agent of the insurance company, knowing as matter of fact that the railroad company is the beneficial owner, although legal title is in the president, and subsequently the president conveys the property to the railroad company, without notice to or consent of the insurance company, there is no such change in the title as to void the insurance, there being, in fact, no change of ownership or possession.

Rhode Island Underwriters' Assoc. v. Monarch, 98 Ky. 305, 32 S. W. Rep. 959, 25 Ins. L. J. 116.

RULE 16.

Effect of Consent to Transfer — Cannot Claim Instrument Void.

If the company consents to a transfer of the policy to a purchaser of property under a bill of sale, it cannot afterward, in a suit upon the policy, set up the defense that the bill of sale was inoperative and void as having been made for the purpose of defrauding creditors.

Clark *v.* Svea Ins. Co., 102 Cal. 252, 30 Pac. Rep. 587, 23 Ins. L. J. 876.

RULE 17.

Sale or Mortgage of Stocks of Merchandise — Sale of Same in Bulk — Change in Partnership.

When the policy insures only such property as should answer the description at time of fire, such as stocks of merchandise, grain, and malt, the sale or mortgage of any part of it does not affect the insurance as to the balance,¹ unless the insured makes claim for the loss to the mortgaged property;² otherwise if the property is sold in bulk or mass, or if there is a change in a partnership owning the goods by introduction of a new member.³

1. Coleman *v.* Phoenix Ins. Co., 3 App. Div. 65, 38 N. Y. Supp. 986; Wolfe *v.* Security Ins. Co., 39 N. Y. 49; Biggs *v.* North Carolina Home Ins. Co., 88 N. C. 141. And see West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289; Lane *v.* Maine Ins. Co., 12 Me. 44.

2. Schumitsch *v.* American Ins. Co., 48 Wis. 26.

3. Biggs *v.* North Carolina Home Ins. Co., *supra*.

RULE 18.

Sale or Transfer by One Partner to Another Partner — Parties Insured May Transfer as Between Themselves — Dissolution — Death — Taking in Third Party as Partner.

A sale or transfer by one partner to another partner of his interest in the property of the firm or partnership insured does not constitute such a change in interest, title, or possession of the partnership insured as to void the insurance;¹ and parties or persons insured may make transfers as between themselves without making such a change as to void the insurance;² and agreement to dissolve the partnership is not of itself such a change of title or possession as to work a forfeiture of the insurance, as the possession of the property of the firm by one partner is the possession of the firm;³ so when one of the partners dies and leaves the property to the surviving partner, who continues the business, there is no such change as to void the policy;⁴ but when a partnership insured takes in a third or outside party as a copartner, transferring to him an interest in the property, it is such a change as will void the insurance;⁵ so when an individual insured takes in a partner there is a change.⁶

1. *Phoenix Ins. Co. v. Holcombe*, 57 Nebr. 622, 78 N. W. Rep. 300, 28 Ins. L. J. 238; *German Ins. Co. v. Fox*, 96 N. W. Rep. 652 (Nebr.); *Georgia Home Ins. Co. v. Hall*, 94 Ga. 630, 21 S. E. Rep. 828; *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. Rep. 587; *Loeb v. Firemen's Ins. Co.*, 38 Misc. 107, 77 N. Y. Supp. 106; *Hoffman v. Ætna Ins. Co.*, 32 N. Y. 405, distinguishing or overruling *Murdock v. Chenango Ins. Co.*, 2 N. Y. 210, and other prior cases; *Dresser v. United Firemen's Ins. Co.*, 45 Hun, 298, aff'd, 122 N. Y. 642, without opinion; *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11; *West v. Citizens'*

Ins. Co., 27 Ohio St. 1; *Dermani v. Home Ins. Co.*, 26 La. Ann. 69; *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553, 11 Ins. L. J. 40; *Powers v. Guardian Ins. Co.*, 136 Mass. 108; *New Orleans Ins. Assoc. v. Holberg*, 64 Miss. 51; *Allemania Ins. Co. v. Peek*, 133 Ill. 220, 24 N. E. Rep. 538; *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. Rep. 754; *Texas Ins. Co. v. Cohen*, 47 Tex. 406. And see *Wood v. American Ins. Co.*, 149 N. Y. 382, 44 N. E. Rep. 80; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551; *Hobbs v. Memphis Ins. Co.*, 1 Sneed, 444 (Tenn.). *Contra*, *Oldham v. Anchor Ins. Co.*, 90 Iowa, 225, 57 N. W. Rep. 861; *Jones v. Phoenix Ins. Co.*, 97 Iowa, 275, 66 N. W. Rep. 169, 25 Ins. L. J. 396; *Finley v. Lycoming Ins. Co.*, 30 Pa. St. 311; *Buckley v. Garrett*, 47 Pa. St. 204; *Keeler v. Niagara Ins. Co.*, 16 Wis. 523.

2. *Collings v. American Central Ins. Co.*, 70 Mo. App. 14; *Royal Ins. Co. v. Sockman*, 15 Ohio C. C. 105; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; *Hoffman v. Aetna Ins. Co.*, *supra*; *Allemania Ins. Co. v. Peek*, *supra*; *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553.

3. *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. Rep. 712, 26 Ins. L. J. 320; *Roby v. American Central Ins. Co.*, 120 N. Y. 510, 24 N. E. Rep. 808, 19 Ins. L. J. 762. See also and compare *Jones v. Phoenix Ins. Co.*, *supra*; *Hathaway v. State Ins. Co.*, 64 Iowa, 229.

Dissolution and division of partnership property may constitute such change as to void the policy.

Dreher v. Aetna Ins. Co., 18 Mo. 128.

4. *Virginia F. & M. Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. Rep. 454.

5. *Germania Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195, 39 N. E. Rep. 77, 24 Ins. L. J. 382, 26 L. R. A. 591; *Card v. Phoenix Ins. Co.*, 4 Mo. App. 424; *Malley v. Atlantic Ins. Co.*, 51 Conn. 222, 13 Ins. L. J. 38. And see *Shuggart v. Lycoming Ins. Co.*, 55 Cal. 408; *Blackwell v. Miami Valley Ins. Co.*, 48 Ohio St. 533.

6. *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. Rep. 247.

Some of the old forms in terms prohibited transfer or change of "any undivided interest" and it was held that a sale by one partner to another voided the insurance.

See *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Hartford Ins. Co. v. Ross*, 23 Ind. 179.

These cases have been cited without noting the change or difference in language.

RULE 19.

Effect of Taking in Partner with Interest in Profits Only.

When partners insured make an agreement with a third party, whereby he acquires and has no interest whatever in the property, but only in profits, it does not void the policy.

Hanover Ins. Co. v. Lewis, 28 Fla. 209, 10 So. Rep. 297, 21 Ins. L. J. 316.

RULE 20.

Executory Agreement Between Partnership and Third Parties to Form Corporation — Change from Partnership to Limited Liability Company.

An executory agreement between a partnership insured and third parties to form a corporation, which is not performed, does not constitute a change in title or possession or any transfer;¹ but changing a partnership into a limited liability company may be such a change of interest as to void the policy.²

1. *Drennen v. London Assur. Co.*, 113 U. S. 51, 116 U. S. 461, 14 Ins. L. J. 187, 15 Ins. L. J. 209, below, 20 Fed. Rep. 657, 13 Ins. L. J. 706.

2. *A. G. Peuchen Co. v. City Ins. Co.*, 18 Ont. App. 446.

RULE 21.

Change by Mortgage — Meaning of Change — Title or Possession — Interest.

The execution of a mortgage by the insured is not such a change in the interest or title as to void the policy;¹ nor is it voided by the execution and delivery of a deed, absolute on its face, but shown by proper evidence to have been intended as a mortgage;² the

word "change" in the condition means a transfer of interest or title, and not simply an incumbrance or lien;³ the words "title or possession" mean an actual change in law or equity, and the word "interest" means a change in the insurable interest of the owner and insured, neither of which is affected by a mere mortgage;⁴ nor does default of insured to pay the debt secured by mortgage, even though legal title passes to the mortgagee, constitute of itself a change in interest, title, or possession.⁵

1. *Germania Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. Rep. 286; *Bushnell v. Farmers' Ins. Co.*, Mo. App. , 85 S. W. Rep. 103; *Lampasas Hotel Co. v. Phoenix Ins. Co.*, 38 S. W. Rep. 361 (Tex. Civ. App.); *Sun Fire Office v. Clark*, 53 Ohio St. 414, 42 N. E. Rep. 248. And see *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. Rep. 490; *Hartford Ins. Co. v. Walsh*, 54 Ill. 164; *Aurora Ins. Co. v. Eddy*, 55 Ill. 213; *Tiefenthal v. Citizens' Ins. Co.*, 53 Mich. 306; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507; *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. Rep. 454; *Chadbourn v. German-American Ins. Co.*, 24 Blatchf. 492, 31 Fed. Rep. 533; *Carson v. Jersey City Ins. Co.*, 14 Vroom, 300 (N. J.); *Byers v. Insurance Co.*, 35 Ohio St. 606, 9 Ins. L. J. 743; *Smith v. Monmouth Ins. Co.*, 50 Me. 96; *Conover v. Mutual Ins. Co.*, 1 N. Y. 290. *Contra*, *East Texas Ins. Co. v. Clarke*, 79 Tex. 23, 15 S. W. Rep. 166, 20 Ins. L. J. 820; *Sossaman v. Pamlico Ins. Co.*, 78 N. C. 145.

2. *Sun Fire Office v. Clark*, *supra*; *German Ins. Co. v. Gibe*, *supra*; *Ætna Ins. Co. v. Jacobson*, 105 Ill. App. 283; *Henton v. Farmers' Ins. Co.*, Nebr. , 95 N. W. Rep. 670; *Peck v. Girard F. & M. Ins. Co.*, 16 Utah, 121, 51 Pac. Rep. 255, 27 Ins. L. J. 265; *Barry v. Hamburg-Bremen Ins. Co.*, 110 N. Y. 1, 17 N. E. Rep. 405; *Wolf v. Theresa Village Ins. Co.*, 115 Wis. 402, 91 N. W. Rep. 1014; *Commercial Ins. Co. v. Spankenble*, 52 Ill. 53; *Bank of Glasco v. Springfield F. & M. Ins. Co.*, 5 Kans. App. 388, 49 Pac. Rep. 329; *Ayres v. Home Ins. Co.*, 21 Iowa, 185; *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144, 3 S. W. Rep. 718; *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308; *Nussbaum v. Northern Assur. Co.*, 37 Fed. Rep. 524. And see *Nease v. Ætna Ins. Co.*, 32 W. Va. 283, 9 S. E. Rep.

233. *Contra*, Western Massachusetts Ins. Co. v. Ricker, 10 Mich. 279.

3. Peck v. Girard F. & M. Ins. Co., 16 Utah, 121, 51 Pac. Rep. 255, 27 Ins. L. J. 265; Mosely v. Northwestern Nat. Ins. Co., Mo. App. , 84 N. W. Rep. 1000.

4. Sun Fire Office v. Clark, *supra*. And see German Ins. Co. v. Gibe, *supra*.

5. Ethington v. Dwelling-House Ins. Co., 55 Mo. App. 129.

Under the Ontario Act execution of a mortgage has been held to be an alienation or change in interest. Mechanics' Society v. Gore District Ins. Co., 3 Tupper, 151; O'Neill v. Ottawa Ins. Co., 30 Up. Can. C. P. 151.

Many of these old cases were decided upon a construction of the word "alienation" frequently to be found in the old forms, or of the words "sale, transfer, or title."

Under old forms and prior to the insertion of the specific condition as to foreclosure (see "Foreclosure") it was held that a foreclosure did not operate as an alienation so long as the insured retained the equity of redemption.

Strong v. Manufacturers' Ins. Co., 10 Pick. 40 (Mass.); Loy v. Home Ins. Co., 24 Minn. 315; Hopkins Mfg. Co. v. Aurora Ins. Co., 48 Mich. 148.

A mortgage is not a change in the title under the Ontario statute.

Sands v. Standard Ins. Co., 27 Grant Ch. 167.

RULE 22.

Chattel Mortgage — Parol Evidence — Chattel Mortgage by One Partner on Firm Property for Individual Benefit.

Execution of a subsequent chattel mortgage, without change of possession, is not of itself such a change in interest, title, or possession as to void the policy.¹ The mere fact that a written assignment was absolute in form does not preclude parol evidence to show that the transaction was merely a pledge to secure the payment of the moneys advanced.² When the effect of a chattel mortgage is to pass title, there is a violation of the condition.³ A chattel mortgage given by one

partner on firm property for his individual benefit may effect or be a change of interest.⁴

1. *Koshland v. Hartford Ins. Co.*, 31 Oreg. 402, 49 Pac. Rep. 866, 26 Ins. L. J. 945; *Union Ins. Co. v. Barwick*, 36 Nebr. 223, 54 N. W. Rep. 519, 22 Ins. L. J. 265; *Forehand v. Niagara Ins. Co.*, 58 Ill. App. 162, rev'd, but on other grounds, 169 Ill. 626; *Rice v. Tower*, 1 Gray, 426 (Mass.). And see *Van Deusen v. Charter Oak Ins. Co.*, 1 Robt. 55 (N. Y.); *Taylor v. Merchants' Ins. Co.*, 83 Iowa, 402, 49 N. W. Rep. 994; *Hennesey v. Manhattan Ins. Co.*, 28 Hun, 98 (N. Y.); *Sovereign Ins. Co. v. Peters*, 12 Duval, 33 (Can. Sup.). *Contra*, *Citizens' Ins. Co. v. Salterio*, 23 Can. S. C. 155; *Torrop v. Imperial Ins. Co.*, 26 Can. S. C. 585; *Dacey v. Agricultural Ins. Co.*, 21 Hun, 83, but note that the policy in this case contained specific condition against incumbrances.

2. *Gettleman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. Rep. 627, 27 Ins. L. J. 160; *Ayres v. Home Ins. Co.*, 21 Iowa, 185; *Ayres v. Hartford Ins. Co.*, 21 Iowa, 198; *Chandler v. Commerce Ins. Co.*, 88 Pa. St. 223.

3. *Woodward v. Republic Ins. Co.*, 32 Hun, 365, 372; *Hanover Ins. Co. v. Connor*, 20 Ill. App. 297. But see and compare *American Artistic Gold Co. v. Glens Falls Ins. Co.*, 1 Misc. 114; *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325; *Kronk v. Birmingham Ins. Co.*, 91 Pa. St. 300; *Van Deusen v. Charter Oak Ins. Co.*, *supra*; *Tallman v. Atlantic Ins. Co.*, 29 How. 71 (N. Y.).

4. *Olney v. German Ins. Co.*, 88 Mich. 94, 50 N. W. Rep. 100. But see Rule 18 *et seq.* And see title "Chattel Mortgage."

RULE 23.

Bill of Sale Must be Delivered and Accepted.

Voluntary execution by the assured of a bill of sale on property insured, and recording of the same without the knowledge of the vendee, or any delivery to him, and without any prior contract, or change of possession, is not such a change in interest as to void the policy.

Omaha Ins. Co. v. Thomson, 50 Nebr. 580, 70 N. W. Rep. 30. And see *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 37 N. E. Rep. 615.

RULE 24.

Effect of Executory Contract of Sale.

An executory contract of sale which has the effect to create and which actually does create an equitable right in the vendee as the beneficial owner may effect such a change in the interest of the vendor as to void the policy,¹ as when the vendee takes possession of the property;² but a mere executory agreement to sell, unaccompanied by delivery of a deed, or possession or right to possession, does not effect a change;³ a vendor remains the owner both in law and equity until at least the purchaser has performed all the acts necessary to entitle him to a deed or specific performance,⁴ or obtained the approval or confirmation by the court when that is required by a condition of the contract.⁵ An unenforceable executory contract of sale effects no change.⁶ So when policy in terms provides it shall be void "if a contract of sale or to sell" the contract must be binding to be effective.⁷

1. *Skinner Ship Building Co. v. Houghton*, 92 Md. 68, 48 Atl. Rep. 85; *Excelsior Foundry Co. v. Western Assur. Co.*, Mich. , 98 N. W. Rep. 9. And see *Cottingham v. Firemen's Fund Ins. Co.*, 14 S. W. Rep. 417, 20 Ins. L. J. 187; *Fire Assoc. v. Flournoy*, 19 S. W. Rep. 793 (Tex.).

2. *Gibb v. Philadelphia Ins. Co.*, 59 Minn. 267, 61 N. W. Rep. 137, 24 Ins. L. J. 313; *Fire Assoc. v. Flournoy*, 84 Tex. 632, 19 S. W. Rep. 793; *Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, 32 N. W. Rep. 514; *Brighton Beach Racing Assoc. v. Home Ins. Co.*, 93 N. Y. Supp. 654.

3. *Jones v. Capital City Ins. Co.*, 122 Ala. 421, 25 So. Rep. 790; *Home Ins. Co. v. Tomkies*, 30 Tex. Civ. App. 404, 71 S. W. Rep. 812, aff'd, 71 S. W. Rep. 814; *Tiemann v. Citizens' Ins. Co.*, 76 App. Div. 5, 78 N. Y. Supp. 620 (in this case it is stated that *Germond v. Home Ins. Co.*, 2 Hun, 540,

to the contrary, was overruled by later cases). And see *Browning v. Home Ins. Co.*, 71 N. Y. 508. And see *Home Ins. Co. v. Bethel*, 142 Ill. 537, 32 N. E. Rep. 510, 22 Ins. L. J. 104, aff'g 42 Ill. App. 475; *Carey v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. Rep. 920; *Pringle v. Des Moines Ins. Co.*, 107 Iowa, 742, 77 N. W. Rep. 521, 28 Ins. L. J. 138; *Kempton v. State Ins. Co.*, 62 Iowa, 83; *Trumbull v. Portage Ins. Co.*, 12 Ohio, 305; *Reynolds v. Mutual Ins. Co.*, 34 Md. 280; *Arkansas Ins. Co. v. Wilson*, 67 Ark. 553, 55 S. W. Rep. 933; *Perry County Ins. Co. v. Stewart*, 19 Pa. St. 45; *Hill v. Cumberland Valley Protection Co.*, 59 Pa. St. 474; *Parcel v. Grosser*, 109 Pa. St. 617; *Grable v. German Ins. Co.*, 32 Nebr. 645, 49 N. W. Rep. 713, 21 Ins. L. J. 132

4. *Phoenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. Rep. 314, aff'g 85 Ill. App. 104; *McLarren v. Hartford Ins. Co.*, 5 N. Y. 151; *Masters v. Madison Ins. Co.*, 11 Barb. 624.

5. *Tiemann v. Citizens' Ins. Co.*, 76 App. Div. 5, 78 N. Y. Supp. 620. And see *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

6. *Moseley v. Northwestern Nat. Ins. Co.*, Mo. App. , 84 S. W. Rep. 1000.

7. *Swank v. Farmers' Ins. Co.*, Iowa, , 102 N. W. Rep. 429.

RULE 25.

Executory Contract for Sale and Exchange of Stock or Goods.

An executory contract for sale and exchange of stock insured; never executed, does not effect such a change in the interest of the assured as to render the policy void;¹ whether goods have been sold, or sale completed so as to transfer the title or not, may be a question of fact for a jury.²

1. *Erb v. German-American Ins. Co.*, 98 Iowa, 606, 67 N. W. Rep. 583.

2. *Richardson v. Insurance Co. N. A.*, 136 N. C. 314, 48 S. E. Rep. 733.

RULE 26.

Change by Deed — Delivery and Acceptance — Record — Void Deed.

A deed in transfer or conveyance to a third party of the property insured is such a change as to void

the policy,¹ even though there is a reconveyance to the insured or agreement to reconvey before the fire;² and a transfer of even less than the legal title may operate as a change against the vendor;³ a conveyance claimed to operate as a change in title or ownership must, to be effective, be fully consummated by delivery and acceptance,⁴ which may be a question of fact;⁵ the mere fact that the instrument is recorded does not dispense with necessity of delivery and acceptance.⁶ A void deed is inoperative as a change in title or interest,⁷ as for instance when insured is mentally incompetent to make it;⁸ so a deed void for usury may be inoperative as an alienation;⁹ or a deed which has been decreed void in another suit;¹⁰ or a transfer invalid under Statute of Frauds.¹¹

1. *Bemis v. Harborcreek Ins. Co.*, 200 Pa. St. 340, 49 Atl. Rep. 769; *Ritchie Co. Bank v. Firemen's Ins. Co.*, 55 W. Va. 261, 47 S. E. Rep. 94; *Rosenstein v. Traders' Ins. Co.*, 79 App. Div. 481, 79 N. Y. Supp. 736; *Bennett v. Mutual Ins. Co.*, Md., 60 Atl. Rep. 99; *Northern Assur. Co. v. City Savings Bank*, 18 Tex. Civ. App. 721, 45 S. W. Rep. 737; *Kabrich v. State Ins. Co.*, 48 Mo. App. 393; *Richmond v. Phoenix Ins. Co.*, 88 Me. 105, 33 Atl. Rep. 786, 25 Ins. L. J. 354; *Lyford v. Connecticut Ins. Co.*, Me., 58 Atl. Rep. 916; *Gillon v. Northern Assur. Co.*, 127 Cal. 480, 59 Pac. Rep. 901; *Langdon v. Minnesota Ins. Co.*, 22 Minn. 193; *Farmers & Merchants' Ins. Co. v. Jensen*, 56 Nebr. 284, 76 N. W. Rep. 577, aff'd, on rehearing, 78 N. W. Rep. 1054; *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 28 (Mass.); *Home Ins. Co. v. Hauslein*, 60 Ill. 521; *Milwaukee Ins. Co. v. Ketterlin*, 24 Ill. App. 188; *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317; *Savage v. Howard Ins. Co.*, 52 N. Y. 502; *Buchanan v. Westchester Ins. Co.*, 61 N. Y. 611; *Foote v. Hartford Ins. Co.*, 119 Mass. 259; *Smith v. Union Ins. Co.*, 120 Mass. 90; *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 164; *Brown v. Cotton Ins. Co.*, 156 Mass. 587, 31 N. E. Rep. 691; *Dailey v. Westchester Ins. Co.*, 131 Mass. 173; *Baldwin v. Phoenix Ins. Co.*, 69 N. H. 164; *Farmers' Ins. Co. v. Archer*,

36 Ohio St. 608; *Gould v. Patrons' Ins. Co.*, 76 Me. 298; *Swenson v. Sun Fire Office*, 68 Tex. 461, 5 S. W. Rep. 60.

2. *Bemis v. Harborcreek Ins. Co.*, 200 Pa. St. 340, 49 Atl. Rep. 769; *Home Ins. Co. v. Hauslein*, 60 Ill. 521; *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608; *Mulville v. Adams*, 19 Fed. Rep. 887, 13 Ins. L. J. 435. And see *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144, 3 S. W. Rep. 718; *Adams v. Rockingham Ins. Co.*, 29 Me. 292; *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. Rep. 454. And see *Biddeford Savings Bank v. Dwelling-House Ins. Co.*, 81 Me. 566. And see under Georgia Code as to effect of agreement for reconveyance, *Virginia Ins. Co. v. Feagin*, 62 Ga. 515. *Contra*, *German Ins. Co. v. Fox*, 96 N. W. Rep. 652 (Nebr.).

3. *Northern Assur. Co. v. City Savings Bank*, *supra*; *Cothingham v. Firemen's Fund Ins. Co.*, 14 S. W. Rep. 417, 20 Ins. L. J. 187 (Ky.).

4. *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. Rep. 5; *Whitney v. American Ins. Co.*, 127 Cal. 464, 59 Pac. Rep. 897; *Schaeffer v. Anchor Ins. Co.*, 113 Iowa, 652, 85 N. W. Rep. 985. And see *Humphry v. Hartford Ins. Co.*, 15 Blatchf. 35 (U. S. Cir.).

5. *Rosenstein v. Traders' Ins. Co.*, 102 App. Div. 47, 92 N. Y. Supp. 326.

6. *Whitney v. American Ins. Co.*, 127 Cal. 464, 59 Pac. Rep. 897; *Franklin Ins. Co. v. Feist*, 31 Ind. App. 390, 68 N. E. Rep. 188; *Hogadone v. Grange Ins. Co.*, 133 Mich. 339, 94 N. W. Rep. 1045. And see *Gilbert v. North American Ins. Co.*, 23 Wend. 43 (N. Y.).

7. *Westchester Ins. Co. v. Jennings*, 70 Ill. App. 539; *Kitterlin v. Milwaukee Ins. Co.*, 134 Ill. 647; *Fitchner v. Fidelity Fire Assoc.*, 103 Iowa, 276, 72 N. W. Rep. 530; *German Ins. Co. v. York*, 48 Kans. 488, 29 Pac. Rep. 586, 21 Ins. L. J. 508; *School District v. Aetna Ins. Co.*, 62 Me. 330; *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308. And see *Commercial Union Assur. Co. v. Scammon*, 123 Ill. 601, 12 N. E. Rep. 324.

8. *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. Rep. 691, 24 Ins. L. J. 385.

9. *Phoenix Ins. Co. v. Asbury*, 102 Ga. 565, 27 S. E. Rep. 667.

10. *Hartford Ins. Co. v. Warbritton*, Kans. , 71 Pac. Rep. 278.

11. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6.

RULE 27.

Attornment of Tenant to Purchaser.

There may be a change in possession effected by the attornment of a tenant to a purchaser of the property.

Northern Assur. Co. v. City Savings Bank, 18 Tex. Civ. App. 721, 45 S. W. Rep. 737.

RULE 28.

Judicial Sale — Redemption — Confirmation.

A judicial sale does not effect a change in interest or title by legal process or judgment until the period allowed by law for redemption has expired;¹ and so when confirmation is required by the court, there is no change until the sale is made final by such ratification or confirmation;² so when the purchaser fails to consummate or complete the sale,³ or makes no claim,⁴ there is no change in title, ownership, or possession, and there is none when the order of confirmation is vacated and set aside.⁵ A judicial sale must be consummated by delivery of the instrument of conveyance, and statutory provisions must be complied with.⁶

1. *Greenlee v. North British & M. Ins. Co.*, 102 Iowa, 427, 71 N. W. Rep. 534, 26 Ins. L. J. 801; *Browne Nat. Bank v. Southern Ins. Co.*, 22 Wash. 379, 60 Pac. Rep. 1123; *Hammel v. Queen Ins. Co.*, 54 Wis. 72. And see *Campbell v. Hamilton Ins. Co.*, 51 Me. 69; *Brunswick v. Commercial Union Assur. Co.*, 68 Me. 313.

2. *Hartford Ins. Co. v. Ransom*, Tex. Civ. App. , 61 S. W. Rep. 144; *Hanover Ins. Co. v. Brown*, 77 Md. 64, 25 Atl. Rep. 989, rehearing denied, 77 Md. 76, 27 Atl. Rep. 314; *Slobodisky v. Phoenix Ins. Co.*, 53 Nebr. 816, 74 N. W. Rep. 270. And see *Collins v. London Assur. Co.*, 165 Pa. St. 298, 30 Atl. Rep. 924, 24 Ins. L. J. 658; *Manhattan Ins. Co. v. Stein*, 5 Bush, 652 (Ky.); *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Haight v. Continental Ins. Co.*, 92 N. Y. 51.

3. *Springfield F. & M. Ins. Co. v. Phillips*, 16 Ky. L. Rep. 390; *Marts v. Cumberland Ins. Co.*, 44 N. J. L. 478.

4. *Lodge v. Capitol Ins. Co.*, 91 Iowa, 103, 58 N. W. Rep. 1089, 23 Ins. L. J. 735.

5. *Richland County Ins. Co. v. Sampson*, 38 Ohio St. 672, 12 Ins. L. J. 283.

6. *International Wood Co. v. National Assur. Co.*, Me. , 59 Atl. Rep. 544.

RULE 29.

Sale of Real Estate on Execution — Redemption.

When the effect of a sale of real estate upon execution is declared by a statute, providing for redemption within a prescribed time, and the right and title of the judgment debtor is not divested by the sale until the expiration of such period, it cannot be claimed that such a sale effects any change in the interest, title, or possession, until expiration of the period for redemption.

Wood v. American Ins. Co., 149 N. Y. 382, 44 N. E. Rep. 80, aff'g 78 Hun, 109, 29 N. Y. Supp. 250, Gray, J., dissenting on ground that there was a change in interest. And see *Hammel v. Queen Ins. Co.*, 54 Wis. 72.

RULE 30.

Partition — Sale — Confirmation.

Partition proceedings wherein the property is set apart for life to the widow of the insured constitute a change in interest, title, or possession;¹ and so when partition is made under judgment therefor;² but when property is sold there is no change until confirmed by the court.³

1. *Trabue v. Dwelling-House Ins. Co.*, 121 Mo. 75, 25 S. W. Rep. 848, 23 Ins. L. J. 529, below, 49 Mo. App. 331.

2. *Barnes v. Union Ins. Co.*, 51 Me. 110.

3. *Terpenning v. Agricultural Ins. Co.*, 14 Hun, 299 (N. Y.).
And see Rule 28

RULE 31.

Sale Under Deed of Trust — Confirmation.

There is no change in title or possession by a mere sale of insured property under a deed of trust, until after such sale is reported to and confirmed by the court.

Hanover Ins. Co. v. Brown, 77 Md. 64, 27 Atl. Rep. 314.

RULE 32.

Levy by Sheriff — Attachment — Possession by Sheriff.

A mere technical levy by a sheriff without actual taking of possession is not such a change as will void the policy;¹ there must be actual seizure under the process.² A levy and taking possession under a warrant of attachment is such change in title and possession as to void the policy, even though the attachment may be vacated or dissolved after the fire.³ Taking possession by a sheriff is a change in the possession.⁴

1. *McClelland v. Greenwich Ins. Co.*, 107 La. 124, 31 So. Rep. 691; *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375, 32 N. E. Rep. 1063, 22 Ins. L. J. 81; *Phoenix Ins. Co. v. Lawrence*, 4 Met. 9 (Ky.); *Commonwealth Ins. Co. v. Berger*, 42 Pa. St. 285; *Smith v. Farmers' Ins. Co.*, 89 Pa. St. 287; *Caraher v. Royal Ins. Co.*, 63 Hun, 82, 17 N. Y. Supp. 858; *Walradt v. Phoenix Ins. Co.*, 64 Hun, 129, 19 N. Y. Supp. 293, aff'd, 136 N. Y. 375, 32 N. E. Rep. 1063, 22 Ins. L. J. 81. And see *Clark v. New England Ins. Co.*, 6 Cush. 342 (Mass.); *Rice v. Tower*, 1 Gray, 426 (Mass.).

2. *McClelland v. Greenwich Ins. Co.*, *supra*.

3. *Carey v. German-American Ins. Co.*, 84 Wis. 80, 54 N. W. Rep. 18.

4. *St. Paul F. & M. Ins. Co. v. Archibold & Kell*, Tex. , 16 Ins. L. J. 153.

Many of the old forms contained a specific clause, omitted from the standard forms, providing that the insurance should cease or become void if property should be "levied on under an execution, or other proceeding at law or in equity."

See *Philadelphia Ins. Co. v. Mills*, 44 Pa. St. 241; *Hammel v. Queen Ins. Co.*, 54 Wis. 72; *Pearman v. Gould*, 15 Stew. Eq. 4 (N. J.); *Insurance Co. v. O'Maley*, 82 Pa. St. 400.

And it was held that the levy of an execution had reference only to a levy on personal property, as there was no such thing in the law as a levy upon real estate.

Colt v. Phoenix Ins. Co., 54 N. Y. 595.

Others provided that policy should cease, "if the property shall be levied upon, or taken into possession or custody under any proceeding in law or equity, and it was held that it was not necessary to remove property from possession of the insured to effect a forfeiture.

Dover Glass Works v. American Ins. Co., 29 Atl. Rep. 1039, 24 Ins. L. J. 12 (Del.).

Some provided that "if the property be levied on or *attached*, or taken into possession or custody under any proceedings in law or equity," and it was held that the word "*attached*" had special reference to personal property.

Tefft v. Providence-Washington Ins. Co., 19 R. I. 185, 32 Atl. Rep. 914, 25 Ins. L. J. 226.

RULE 33.

Appointment of Receiver — Receiver of Partnership — Change of Receiver.

The appointment of a receiver after the fire cannot have any retroactive effect upon title or possession before the fire as to avoid the insurance upon ground of change therein. A decree subsequent to the fire cannot change the title and possession of property which has ceased to exist;¹ the appointment and possession of a partner as receiver of a partnership insured is no change in interest or possession,² and when

a receiver is insured a change of receiver is no change in title or possession.³

1. *Small v. Westchester Ins. Co.*, 51 Fed. Rep. 789, 22 Ins. L. J. 660.

2. *Keeney v. Home Ins. Co.*, 71 N. Y. 396.

3. *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. Rep. 1019, 19 Ins. L. J. 481.

RULE 34.

Void Sale — Insured Continuing in Possession.

A decree of a court setting a sale aside on ground of fraud or irregularity makes the same void, not only from the date of the decree, but from the beginning, where the insured continues in possession, asserting his ownership and taking prompt steps to obtain such a decree, although fire occurs before it is obtained.

Niagara Ins. Co. v. Scammon, 144 Ill. 490, 32 N. E. Rep. 914, 28 N. E. Rep. 919, 21 Ins. L. J. 592, 22 Ins. L. J. 157. And see *Scammon v. Commercial Union Assur. Co.*, 126 Ill. 355, 18 N. E. Rep. 562, aff'g 20 Ill. App. 500.

RULE 35.

Effect of Adjudication in Bankruptcy.

An adjudication in bankruptcy effects no sale or transfer of property until the bankrupt's estate is vested in the trustee;¹ and so the mere adjudication and appointment of a receiver in bankruptcy do not effect a change in interest or title.²

1. *Fuller v. New York Ins. Co.*, 184 Mass. 12, 67 N. E. Rep. 879.

2. *Fuller v. Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 456.

RULE 36.

Waiver or Estoppel When Policy Issues.

Issue of policy with knowledge by the company or its agent of the facts, coupled with acceptance and retention of the premium after consummation of the change, operates as a waiver or estoppel;¹ but the agent cannot, when policy issues orally, agree to a change after issue of the policy;² a demand for, and receipt of, the premium, with knowledge of the facts, may operate as evidence of waiver or estoppel;³ consent to transfer or change may be orally given by the company's agent, authorized to give such consents, without written indorsement;⁴ but may be otherwise when the policy limits the authority of the agent to giving consent or making indorsement in writing.⁵ There may be waiver or estoppel when the agent makes a written indorsement upon the policy, recognizing it as a valid contract with knowledge of the facts.⁶ So where he makes a false indorsement with knowledge of the facts, upon the principle of estoppel.⁷

1. *Millis v. Scottish Union Ins. Co.*, 95 Mo. App. 211, 68 S. W. Rep. 1066; *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 27 Pac. Rep. 738, 742, 21 Ins. L. J. 137; *German-American Ins. Co. v. Sanders*, 17 Ind. App. 134, 46 N. E. Rep. 535. And see *McQueen v. Phoenix Ins. Co.*, 4 Duval, 660 (Can.).

Acceptance and retention of premium and omission to cancel may be evidence of estoppel.

North British F. & M. Ins. Co. v. Steiger, 26 Ill. App. 228, aff'd, 124 Ill. 81, 16 N. E. Rep. 95; *German Ins. Co. v. Sanders*, 17 Ind. App. 134, 46 N. E. Rep. 535.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 30, and see this volume "Cancellation."

2. *Cornelius v. Farmers' Ins. Co.*, 113 Iowa, 183, 84 N. W. Rep. 1037. And see *McNierney v. Agricultural Ins. Co.*, 48 Hun, 239.

3. *Medearis v. Anchor Ins. Co.*, 104 Iowa, 88, 73 N. W. Rep. 495; *German Ins. Co. v. Orr*, 56 Ill. App. 637; *Hartford Ins. Co. v. Orr*, 56 Ill. App. 629; *Buckley v. Garrett*, 47 Pa. St. 204. But see and compare *Shuggart v. Lycoming Ins. Co.*, 55 Cal. 408.

4. *Home Ins. Co. v. Nichols*, Tex. Civ. App. , 72 S. W. Rep. 440; *Continental Ins. Co. v. Brooks*, 131 Ala. 614, 30 So. Rep. 876; *West Coast Lumber Co. v. State Investment Ins. Co.*, 98 Cal. 502, 33 Pac. Rep. 258, 22 Ins. L. J. 681 (policy in this case did not contain clause limiting authority to waiver only in writing, etc.); *Illinois Ins. Co. v. Stanton*, 57 Ill. 354.

5. See Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver." And "Agents," this volume.

6. *Stuart v. Reliance Ins. Co.*, 179 Mass. 434, 60 N. E. Rep. 929. And see *Getman v. Guardian Ins. Co.*, 46 Ill. App. 490; *Bonenfant v. American Ins. Co.*, 76 Mich. 653, 43 N. W. Rep. 682; *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505.

7. *Nute v. Hartford Ins. Co.*, Mo. App. , 83 S. W. Rep. 83.

RULE 37.

Waiver or Estoppel After Issue of Policy.

Where the company's agent, after issue of the policy, is notified of a change in interest or title, the policy not being in the possession or under the control of the assured, and is at the same time paid a balance of premium or the premium then due, on the agent's representation that it would be all right, the agent also giving a receipt for the money, it operates as an equitable estoppel preventing a claim of forfeiture, and it may be found as a fact that such receipt is given to be added or attached to the policy;¹ but a mere promise to make an indorsement on production of the policy does not operate as a waiver;² there is no waiver by mere knowledge or notice, after issue of the policy,³ though the company may be estopped by the acts and declarations of its agent, upon which insured relies.⁴

1. *Northam v. International Ins. Co.*, 45 App. Div. 177, 61 N. Y. Supp. 45, aff'd, on opinion below, 165 N. Y. 666. And

see as construed by the Court of Appeals in *Northam v. Dutchess County Ins. Co.*, 166 N. Y. 319, 324, 59 N. E. Rep. 912.

2. *Equitable Ins. Co. v. Cooper*, 60 Ill. 509; *Northam v. Dutchess County Ins. Co.*, 177 N. Y. 73, 69 N. E. Rep. 222.

3. *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. Rep. 295.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 27 and 28.

4. *Continental Ins. Co. v. Thomasson*, 84 S. W. Rep. 546 (Ky.); *Mattingly v. Springfield F. & M. Ins. Co.*, 83 S. W. Rep. 577 (Ky.).

As to the power of agents to orally waive the conditions of the policy after its issue and delivery, the courts do not agree.

See this volume, chapter on "Agents," and Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver." Compare the various rules.

RULE 38.

Effect of Consent to Assignment of Policy.

A consent by company's agent, with knowledge of the facts, to an assignment of the policy indorsed thereon, operates as a waiver of any forfeiture, on ground of the change or transfer of the interest in or title to the property;¹ and without an assignment of the policy the transferee has no interest in the policy and claim thereunder which a waiver could affect.²

1. *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495, 13 Ins. L. J. 45; *Shearman v. Niagara Ins. Co.*, 46 N. Y. 526; *Phoenix Ins. Co. v. Lindley*, 111 Ill. App. 266; *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460; *Gilliat v. Pawtucket Ins. Co.*, 8 R. I. 282; *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628; *New Orleans Ins. Assoc. v. Holberg*, 64 Miss. 51. And see *McNierney v. Agricultural Ins. Co.*, 48 Hun, 239.

2. *Langdon v. Minnesota Ins. Co.*, 22 Minn. 193. And see *Lahiff v. Ashuelot Ins. Co.*, 60 N. H. 75, 13 Ins. L. J. 796; *Lett v. Guardian Ins. Co.*, 125 N. Y. 82, 25 N. E. Rep. 1088, 20 Ins. L. J. 176.

RULE 39.

Effect of Making Loss Payable to a Third Party.

Making or indorsing the loss, if any, payable to a third party does not of itself imply knowledge of or consent to a sale or transfer, because it is entirely consistent with a mere transfer of the right, if any, of the insured to receive payment in the event of loss;¹ but such an indorsement making payable to a mortgagee, with knowledge of the facts, may be evidence of waiver of a forfeiture upon ground of alienation and existence of the mortgage.² And so when indorsement is made making payable to third party with notice of transfer.³

1. *Bates v. Equitable Ins. Co.*, 10 Wall. 33 (U. S.); *Perry v. Lorillard Ins. Co.*, 61 N. Y. 214; *Fogg v. Middlesex Ins. Co.*, 10 Cush. 337 (Mass.). And see *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435; *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 28 (Mass.); *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Bates v. Equitable Ins. Co.*, 3 Cliff. 215 (U. S. Cir.).

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to Fire Insurance Contract," Rule 17.

2. *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 164, 135 Mass. 248, 12 Ins. L. J. 687.

See the mortgagee clause in Massachusetts standard form.

3. *Batchelor v. People's Ins. Co.*, 40 Conn. 56.

RULE 40.

Contract Divisible.

When the insurance is itemized in separate amounts as to several distinct subjects, and there is a change in title or otherwise as to one of these subjects, it does not affect the policy as to the other subjects.

Commercial Ins. Co. v. Spankneble, 52 Ill. 53; *Dwelling-House Ins. Co. v. Butterly*, 33 Ill. App. 626; *Quarrier v. Pea-*

body Ins. Co., 10 W. Va. 507; Royal Ins. Co. v. Martin, 192 U. S. 149, 24 Sup. Ct. Rep. 247. *Contra*, Baldwin v. Hartford Ins. Co., 60 N. H. 422, 10 Ins. L. J. 433.

And see Vol. 1, Fire Insurance as a Valid Contract, "Construction," Rule 26.

RULE 41.

When Contract not Divisible.

When the policy insures building and machinery therein in separate amounts, and provides that if "any change in title in the property insured in whole or in part," it should be void, the contract is not divisible, and if forfeited for want of title as to the building it is also void as to the machinery.

Kahler v. Iowa State Ins. Co., 106 Iowa, 380, 76 N. W. Rep. 734.

And see Vol. 1, Fire Insurance as a Valid Contract, "Construction," Rule 26.

RULE 42.

What is a Change — Illustrative Cases.

The execution, delivery, and acceptance of a voluntary assignment of insured property for the benefit of creditors, and possession by the assignee under it, effects such a change in the interest, title, and possession as to void the insurance. It can make no difference that the assignment may be void as to creditors for fraud or for noncompliance with the requirements of the statute in regard to such assignments;¹ change is effected by a sale and conveyance in partition between devisees, though devisee insured has not parted with possession under such deed;² leasing the property and surrendering the possession by the insured to the lessee is such change in possession as to void the

policy;³ a change may be effected by a marriage contract or settlement, though made conditional;⁴ sheriff's deed on foreclosure or a sale in foreclosure effects a change or alienation;⁵ a lease with agreement to convey title on payment of a certain sum;⁶ there is change notwithstanding an agreement for reconveyance;⁷ there is change of title by cancellation of entry by the Secretary of the Interior,⁸ by conveyance from insured to his wife.⁹

1. *Milwaukee Trust Co. v. Lancashire Ins. Co.*, 95 Wis. 192, 70 N. W. Rep. 81; *Orr v. Hanover Ins. Co.*, 158 Ill. 149, 41 N. E. Rep. 854, 25 Ins. L. J. 624; *Hartford Ins. Co. v. Orr*, 56 Ill. App. 629; *Ohio Farmers' Ins. Co. v. Waters*, 65 Ohio St. 157, 61 N. E. Rep. 711; *Northam v. Dutchess County Ins. Co.*, 166 N. Y. 319, 59 N. E. Rep. 912; *Dadmum Mfg. Co. v. Worcester Ins. Co.*, 11 Met. 429 (Mass.); *Perry v. Lorillard Ins. Co.*, 6 Lans. 201, aff'd, 61 N. Y. 214. And see *Dube v. Mascoma Ins. Co.*, 64 N. H. 527, 15 Atl. Rep. 141.

It seems it may be otherwise when insured retains possession. *Phoenix Ins. Co. v. Lawrence*, 4 Met. 9 (Ky.).

2. *Robinson v. North B. & M. Ins. Co.*, 53 S. W. Rep. 660 (Ky.).

3. *Planters' Ins. Assoc. v. Dewberry*, 69 Ark. 295, 62 S. W. Rep. 1047; *Wenzel v. Commercial Ins. Co.*, 67 Cal. 438, 14 Ins. L. J. 809. And see *Elliott v. Farmers' Ins. Co.*, 114 Iowa, 153, 86 N. W. Rep. 224. And compare *Rumsey v. Phoenix Ins. Co.*, 17 Blatchf. 527 (U. S. Cir.); *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136. And Rule 1.

It was held that a lease which only changed possession was not a change of title.

West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; *Planters' Ins. Co. v. Rowland*, 66 Md. 236, 16 Ins. L. J. 345.

4. *Cummins v. National Ins. Co.*, 81 Mo. App. 291.

5. *Hagaman v. Allemania Ins. Co.*, Pa. St., 10 Ins. L. J. 838; *McLaren v. Hartford Ins. Co.*, 5 N. Y. 151; *Bishop v. Clay Ins. Co.*, 45 Conn. 430; *Commercial Union Assur. Co. v. Scammon*, 102 Ill. 46.

6. *Fire Assoc. v. Flournoy*, 19 S. W. Rep. 793 (Tex.).

7. *Tatham v. Commerce Ins. Co.*, 4 Hun, 136; *McKissick v. Mill Owners' Ins. Co.*, 50 Iowa, 116.

And see Rules 26, 43.

8. *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. Rep. 453.

9. *Melcher v. Ins. Co. of Pa.*, 97 Me. 512, 55 Atl. Rep. 411.

RULE 43.

What is not a Change — Illustrative Cases.

Death of the insured is not such change as to void the policy;¹ an assignment of a lease of the insured property as collateral security for a loan does not violate the condition;² there is no change in appointment of receiver on application of a mortgagee to whom the loss was made payable;³ when policy is on *use and occupation* of a grain elevator plant, none by pooling arrangement with other elevators;⁴ there is no change effected by a void court order opening a foreclosure decree under which the insured had obtained title;⁵ and none by mere decree *in invitum* for sale of insured property, but no sale until after the fire and no change in possession;⁶ where the insured holds a policy on "lumber, his own, or held by him in trust, or on commission, or sold but not delivered" and makes a contract with a third party to saw logs into lumber it does not constitute such a change as to void the insurance.⁷ Levy of an attachment on stock of goods insured and possession of officer thereunder, followed by execution and appointment of a receiver who never obtained possession, unless risk is thereby increased, is not such a change in interest, title, or possession as to void the insurance.⁸ Resignation of trustees insured and substitution of another trustee, and appointment of a receiver in place of the trustee is not such a change in

the possession as to void the insurance.⁹ The mere pendency of a creditor's suit founded upon a bill in equity against the insured having for its object the fastening of a specific lien on the insured property with a subsequent sale, does not involve the title or possession of the insured so as to void the insurance.¹⁰ Where the policy was issued to a widow and heirs upon a dwelling-house, and the heirs subsequently deeded to the widow for her life the dwelling in question to which the widow was entitled as a homestead, it does not constitute such a change in the title as to void the insurance;¹¹ temporary absence of insured and his family leaving property in charge of an agent or servant is not a change in possession;¹² so a partial vacancy does not amount to a change in the title or possession;¹³ a parol contract for sale of personal property without payment or change in possession does not void the policy;¹⁴ a sale must be valid as between the parties to be effective as such;¹⁵ and there is no change in title by an executory contract for sale of goods when the title remains in the insured;¹⁶ a sale by insured to one in possession as lessee, with mortgage back for deferred payments, not such change in title or possession as to void policy;¹⁷ conveyance by insured and wife of tax title interest to a third party who immediately conveys back to insured is not a sale;¹⁸ and so a conveyance and reconveyance to insured is not a sale or change;¹⁹ a notice filed under a mechanic's lien law does not effect a change of interest;²⁰ delivery of pos-

session to a mortgagee holding assignment of policy with consent of the company is not an alienation;²¹ mere seizure by the United States does not divest title;²² interest of a vendee insured under an executory contract of purchase not changed by mortgage of vendor if no obligation on part of vendee for its payment;²³ a transfer of property does not void the policy when the company's consent is given on the same day by indorsement on the policy which is then subsequently assigned to the vendee.²⁴

1. *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 55 N. E. Rep. 139, aff'g 77 Ill. App. 413; *Forest City Ins. Co. v. Eaton*, 86 Ill. App. 463; *Planters' Ins. Assoc. v. Dewberry*, 69 Ark. 295, 62 S. W. Rep. 1047; *Richardson v. German Ins. Co.*, 89 Ky. 571, 13 S. W. Rep. 1, 19 Ins. L. J. 503, 8 L. R. A. 800.

It was formerly held to the contrary, see *Miller v. German Ins. Co.*, 54 Ill. App. 53; *Lappin v. Charter Oak Ins. Co.*, 58 Barb. 325; *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447; *Hine v. Woolworth*, 93 N. Y. 75, 13 Ins. L. J. 71.

But the courts did not agree and it was also held that death did not effect an alienation.

Burbank v. Rockingham Ins. Co., 4 Fost. 550 (N. H.); *Farmers' Ins. Co. v. Graybill*, 74 Pa. St. 17; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88 (Va.); *Pfister v. Gerwig*, 122 Ind. 567. (The specific exception is now expressed in the condition. See Rule I.)

2. *Northam v. International Ins. Co.*, 45 App. Div. 177, 61 N. Y. Supp. 45, aff'd, 165 N. Y. 666, on opinion below.

3. *Farmers' Ins. Co. v. Baker*, 94 Md. 545, 51 Atl. Rep. 184 (the language of the condition in this case was "shall cease from time the property is levied on or taken into possession or control under any proceedings in law or equity whether change in possession or not").

4. *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 63 N. E. Rep. 810.

5. *Porter v. Orient Ins. Co.*, 72 Conn. 519, 45 Atl. Rep. 7.

6. *Cleavenger v. Franklin Ins. Co.*, 47 W. Va. 595, 35 S. E. Rep. 998. And see *Baley v. Homestead Ins. Co.*, 80 N. Y. 21.

7. *West Branch Lumbermen's Exchange v. American Ins. Co.*, 183 Pa. St. 366, 38 Atl. Rep. 1081, 27 Ins. L. J. 305.

8. *Herman v. Katz*, 101 Tenn. 118, 47 S. W. Rep. 86, 41 L. R. A. 700.
9. *Georgia Home Ins. Co. v. Bartlett*, 91 Va. 305, 21 S. E. Rep. 476, 24 Ins. L. J. 685.
10. *Small v. Westchester Ins. Co.*, 51 Fed. Rep. 789, 22 Ins. L. J. 660.
11. *Collings v. American Central Ins. Co.*, 70 Mo. App. 14.
12. *Shearman v. Niagara Ins. Co.*, 46 N. Y. 526.
13. *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.
14. *Ætna Ins. Co. v. Jackson*, 16 B. Mon. 242 (Ky.).
15. *Orrell v. Hampden Ins. Co.*, 13 Gray, 431 (Mass.).
16. *Boston & Salem Ice Co. v. Royal Ins. Co.*, 12 Allen, 381 (Mass.). And see *Pitney v. Glens Falls Ins. Co.*, 61 Barb. 335, aff'd, 65 N. Y. 6.
17. *Savage v. Long Island Ins. Co.*, 43 How. 462 (N. Y.).
18. *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116.
19. *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. Rep. 454. And see *Schloss v. Westchester Ins. Co.*, Ala. , 37 So. Rep. 701. Also Rules 26, 42.
20. *Green v. Homestead Ins. Co.*, 82 N. Y. 517.
21. *Washington Ins. Co. v. Hayes*, 17 Ohio St. 432.
22. *Keith v. Globe Ins. Co.*, 52 Ill. 518.
23. *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. Rep. 587, 20 Ins. L. J. 506.
24. *Clifton Coal Co. v. Scottish Union & Nat. Ins. Co.*, 102 Iowa, 300, 71 N. W. Rep. 433, 26 Ins. L. J. 1007.

TITLE VIII.

Assignment of Policy.

- RULE
1. As imposed by contract.
 2. Condition valid and reasonable — Violation voids the policy — Written consent may be on separate paper to be attached.
 3. Duty of assignee to procure written consent of the company — Estoppel.
 4. Effect of company's consent to assignment — Waiver.
 5. Assignment need not be in writing unless required by statute.
 6. Assignment of policy not dependent upon form — Question of intention.
 7. Assignment not inferred.

- RULE 8.** Loss made payable to assignee — Must be evidence of knowledge and intent — Effect of making loss payable to third party — Sale of property does not include policy.
9. An assignment of the policy and sale or transfer of the property are distinct and independent — Both must be consented to.
 10. While both assignment of policy and transfer of property must be consented to, immaterial as to order in time.
 11. Effect of company's consent to assignment of policy.
 12. Assignee must have insurable interest.
 13. Assignee of policy takes it subject to conditions.
 14. Assignment with consent of company to purchaser of property — Effect.
 15. Assignment may be made conditional.
 16. One of several insured may assign his interest.
 17. Effect of general assignment for benefit of creditors.
 18. Effect of adjudication in bankruptcy.
 19. Rule as to statement of interest inapplicable to assignment of policy.
 20. Assignor of policy no power to impair validity of policy.
 21. Insured cannot acquire claim under void policy by assignment from mortgagee.
 22. Assignment as between partners.
 23. Assignment as security or collateral.
 24. Right of assignment.
 25. Effect of assignment as security — Lien.
 26. When assigned as security subject to violation of conditions by assignor.
 27. Assignment by mortgagee.
 28. Assignment after loss.
 29. Effect of assignment after loss to a trustee.
 30. Assignment after loss induced by false representation.
 31. Assignment after fire includes right to reformation.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if this policy be assigned before a loss.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island,
New Jersey,	Wisconsin.

The standard form of policy prescribed in Michigan is the same, except, there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.”

The standard form of policy prescribed in

Maine

Massachusetts,

provides:

“This policy shall be void if without the assent in writing or in print of the company, this policy shall be assigned.

The standard form of policy prescribed in Minnesota provides that:

“This policy shall be void if without the assent of the company, this policy shall be assigned.”

The standard form of policy prescribed in New Hampshire provides:

“This policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: * * * if, without the assent in writing or in print of the company, this policy shall be assigned.”

The standard form of policy prescribed in South Dakota provides:

“This policy shall be void if this policy be assigned before a loss without the assent of the insurer.”

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

* See note to “Concealment,” Rule 1, page 2.

RULE 2.

**Condition Valid and Reasonable—Violation Voids Policy—
Written Consent May be on Separate Paper to be Attached.**

An assignment of the policy without written consent of the insurance company as required by its terms renders it void;¹ and the condition requiring such consent is construed by the courts as a valid and reasonable requirement.² Consent may be given in writing on a separate piece of paper, attached, or to be attached, to the policy.³

1. *Waterhouse v. Gloucester Ins. Co.*, 69 Me. 409; *Lyford v. Connecticut Ins. Co.*, Me. , 58 Atl. Rep. 916; *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308; *Cascade F. & M. Ins. Co. v. Journal Pub. Co.*, 1 Wash. 452, 25 Pac. Rep. 331, 20 Ins. L. J. 395; *Miles Lamp Chimney Co. v. Erie Ins. Co.*, Ind. , 73 N. E. Rep. 107; *New v. German Ins. Co.*, Ind. , 31 N. E. Rep. 475, 21 Ins. L. J. 754; *Hall v. Continental Ins. Co.*, 84 S. W. Rep. 519 (Ky.). And see *Hooper v. Hudson River Ins. Co.*, 15 Barb. 413, aff'd, 17 N. Y. 424; *Lett v. Guardian Ins. Co.*, 125 N. Y. 82, 25 N. E. Rep. 1088, 20 Ins. L. J. 176; *Smith v. Saratoga Ins. Co.*, 1 Hill, 497, aff'd, 3 Hill, 508 (N. Y.); *Garland v. Insurance Co. N. A.*, 9 Bradw. 571 (Ill.); *Grant v. Eliot Ins. Co.*, 75 Me. 196.

2. *Biggs v. North Carolina Home Ins. Co.*, 88 N. C. 141, 13 Ins. L. J. 302; *Spare v. Home Ins. Co.*, 19 Fed. Rep. 14; *Stolle v. Aetna Ins. Co.*, 10 W. Va. 546.

3. *Pennsylvania Ins. Co. v. Bowman*, 44 Pa. St. 89.

As to whether company's agent can orally consent to an assignment of the policy, the courts do not agree. That he may so consent see *Home Ins. Co. v. Gaddis*, Ky. , 10 Ins. L. J. 774. That he cannot, see *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," and this volume, chapter on "Agents."

Under the Iowa statute the assignment itself is valid, notwithstanding condition prohibiting it, but is subject to defenses.

Mershon v. National Ins. Co., 34 Iowa, 87, citing *McClain's Annot. R. S. 1888*, § 3262, now section 3046, *Annot. Code of Iowa, 1897*, reading as follows:

"§ 3046. *When assignment prohibited.*—When by the terms of an instrument its assignment is prohibited, an assignment

thereof shall nevertheless be valid, but the maker may avail himself of any defense or counterclaim against the assignee which he may have against any assignor thereof before notice of such assignment is given to him in writing."

RULE 3.

Duty of Assignee to Procure Written Consent of the Company — Estoppel.

An assignee of the policy upon or after the transfer of the title to the property insured acquires no rights by a mere assignment of the policy, and cannot rely upon a verbal statement or promise of the agent of the insurance company that its consent would be indorsed upon the policy;¹ though the insurance company may be estopped by a statement of its officers that indorsement of consent on the policy is not necessary.²

1. *New v. German Ins. Co.*, Ind. , 31 N. E. Rep. 475, 21 Ins. L. J. 754; *Shuggart v. Lycoming Ins. Co.*, 55 Cal. 408.

2. *Stolle v. Ætna Ins. Co.*, 10 W. Va. 546.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver" and "Agents," this volume.

RULE 4.

Effect of Company's Consent to Assignment — Waiver.

The company's consent to an assignment of the policy operates as a waiver of an objection that the assignor had no interest to assign;¹ but a naked consent to a transfer of the property does not operate as a waiver of a consent to assignment of the policy; to be effective as a new contract of insurance with the assignee consent must be given with knowledge that the intent was to transfer the insurance as well as the property;² the company's consent to an assign-

ment of the policy includes an implied consent to the change in the possession and title of the property covered thereby;³ and its consent with knowledge that the title had vested in the assignee operates as a waiver of intermediate conveyances by the assured.⁴ And the insurance company cannot raise objection that the assignee's deed is defective for want of sufficient description and acknowledgment.⁵

1. *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. Rep. 839.

2. *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. Rep. 835, 24 Ins. L. J. 154.

3. *Small v. Westchester Ins. Co.*, 51 Fed. Rep. 789, 22 Ins. L. J. 660; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Hooper v. Hudson River Ins. Co.*, 15 Barb. 413, aff'd, 17 N. Y. 424; *Wolfe v. Security Ins. Co.*, 39 N. Y. 49; *Farmers' Ins. Co. v. Ashton*, 31 Ohio St. 477; *Scottish Union & Nat. Ins. Co. v. Brown*, 24 Ohio Cir. 52.

4. *North British & M. Ins. Co. v. Gunter*, 12 Tex. Civ. App. 598, 35 S. W. Rep. 715; *Benninghoff v. Agricultural Ins. Co.*, *supra*.

5. *Breckinridge v. American Central Ins. Co.*, 87 Mo. 62.

RULE 5.

Assignment Need not be in Writing Unless Required by Statute.

When a statute requires a contract of fire insurance to be in writing, an assignment of it, with consent of the company, operating as a new contract of insurance, must also be in writing;¹ in absence of a statute such assignment need not be in writing,² and it is sufficient to show an equitable assignment.³

1. *St. Paul F. & M. Ins. Co. v. Brunswick Grocery Co.*, 113 Ga. 786, 39 S. E. Rep. 483; *National Ins. Co. v. Grace*, 106 Ga. 264, 32 S. E. Rep. 100.

2. *Assurance Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. Rep. 265; *German-American Ins. Co. v. Sanders*, 17 Ind. App. 134,

46 N. E. Rep. 535; *O'Brien v. Insurance Co.*, 11 N. Y. Supp. 125.

3. *German-American Ins. Co. v. Sanders*, *supra*.

RULE 6.

Assignment of Policy not Dependent upon Form — Question of Intention.

An assignment of the policy by the insured is not dependent upon any particular form; its delivery to a purchaser on sale of the property may be a valid assignment;¹ possession of the policy is not necessary to the validity of an assignment, and the question of delivery and acceptance of an assignment is frequently one of intention, depending on the circumstances of the particular transaction.²

1. *Pierce v. Nashua Ins. Co.*, 50 N. H. 297.

2. *Baker v. Crosby*, 26 Jones & Sp. 577, 11 N. Y. Supp. 575.

RULE 7.

Assignment not Inferred.

An assignment of the policy will not be inferred from general language in transfer of property, when there is no assignment or delivery of the policy itself and there is evidence of intent otherwise.

Kitts v. Massasoit Ins. Co., 56 Barb. 177. And see *White v. Robbins*, 21 Minn. 370.

RULE 8.

Loss Made Payable to Assignee — Must be Evidence of Knowledge and Intent — Effect of Making Loss Payable to Third Party — Sale of Property Does not Include Policy.

While an assignment of the policy must be consented to by the insurance company, it does not depend

upon any particular form, and such consent may be evidenced by an indorsement making the loss payable to the assignee;¹ but there must be some evidence of knowledge and intent either in the language of the indorsement or otherwise, as simply making the loss payable to a third party operates only to make him an appointee to receive the loss due the *insured*, and does not of *itself* change the relation of the parties.² Consent to assignment of the policy to a purchaser may inure to the benefit of a co-owner or joint owner, though not expressly mentioned.³ Statements made by an assignor of the policy after he has parted with the possession of the policy are not admissible in evidence to defeat the title of the assignee.⁴ A sale of the property does not include a transfer of the insurance or policy.⁵

1. *Queen Ins. Co. v. Block*, 58 S. W. Rep. 471 (Ky.). And see *Hanover Ins. Co. v. Brown*, 77 Md. 76, 27 Atl. Rep. 314; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570; *Martin v. Franklin Ins. Co.*, 9 Vroom, 140 (N. J.); *Froehly v. North St. Louis Ins. Co.*, 32 Mo. App. 302; *Buchanan v. Exchange Ins. Co.*, 61 N. Y. 26; *Griswold v. American Central Ins. Co.*, 70 Mo. 654; *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; *Burbank v. McCluer*, 54 N. H. 339; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435.

2. Vol. 1; *Fire Insurance as a Valid Contract*, "Parties to the Fire Insurance Contract," Rule 17.

Baughman v. Camden Mfg. Co., 65 N. J. Eq. 546, 56 Atl. Rep. 376. And see *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. Rep. 835, 24 Ins. L. J. 154; *Froehly v. St. Louis Ins. Co.*, 32 Mo. App. 302; *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169 (Mass.); *Frink v. Hampden Ins. Co.*, 45 Barb. 384; *Bates v. Equitable Ins. Co.*, 3 Cliff. 215 (U. S. Cir.); *Martin v. Franklin Ins. Co.*, 9 Vroom, 140 (N. J.); *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435.

3. *Palatine Ins. Co. v. Boyd*, 50 S. W. Rep. 643 (Tex. Civ. App.).

4. *Muncey v. Sun Ins. Office*, 109 Mich. 542, 67 N. W. Rep. 562. And see *Pollard v. Somerset Ins. Co.*, 42 Me. 221.

5. *Moffitt v. Phoenix Ins. Co.*, *supra*. And see *National Ins. Co. v. Crane*, 16 Md. 260; *White v. Robbins*, 21 Minn. 370; *Lett v. Guardian Ins. Co.*, 125 N. Y. 82, 25 N. E. Rep. 1088, 20 Ins. L. J. 176.

RULE 9.

An Assignment of the Policy and Sale or Transfer of the Property are Distinct and Independent—Both Must be Consented to.

As a fire insurance policy is a contract personal to the insured, a sale or transfer by him of the subject-matter of the insurance does not carry with it the sale or transfer of an unexpired policy against loss by fire on the same, and both must be consented to by the insurance company, or the policy becomes void;¹ but consent to transfer or sale of the property may be implied from a consent to an assignment of the policy with knowledge of the facts,² specially when evidenced by the language of the indorsement to which consent is given by the insurance company.³

1. *New England Loan & Trust Co. v. Kenneally*, 38 Nebr. 895, 57 N. W. Rep. 759; *Doggett v. Blank*, 70 Mo. App. 499; *Watts v. Fire Assoc.*, 87 Mo. App. 83; *Moffitt v. Phoenix Ins. Co.*, 11 Ind. App. 233, 38 N. E. Rep. 835, 24 Ins. L. J. 154; *Simeral v. Dubuque Ins. Co.*, 18 Iowa, 319; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385 (N. Y.); *Salterio v. City of London Ins. Co.*, 23 Can. S. C. 32.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to the Fire Insurance Contract," Rule 1.

2. See Rule 8. And see *Hoyt v. Hartford Ins. Co.*, 26 Hun, 416, *aff'd*, 96 N. Y. 650, without opinion; *Wolfe v. Security Ins. Co.*, 39 N. Y. 49; *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460; *New Orleans Ins. Assoc. v. Holberg*, 64 Miss. 51; *Scottish Union & Nat. Ins. Co. v. Brown*, 24 Ohio Cir. 52.

3. *Hoyt v. Hartford Ins. Co.*, *supra*.

RULE 10.

**While Both Assignment of Policy and Transfer of Property
Must be Consented to, Immaterial as to Order in Time.**

It is no objection that the transfer of the property precedes the consent to the assignment of the policy. The subsequent consent to the assignment may relate back to a previous conveyance, and operate as a consent to such conveyance;¹ and so it is immaterial that the policy is assigned before the company's consent is indorsed.² But after the transfer of the title to the property, the insured can pass no right to an assignee by a mere assignment of the policy; it must be consented to as prescribed by the insurance company.³

1. *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495. And see *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460; *Clifton Coal Co. v. Scottish Union & National Ins. Co.*, 102 Iowa, 300, 71 N. W. Rep. 433, 26 Ins. L. J. 1007.

2. *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570, 19 Atl. Rep. 793.

3. *New v. German Ins. Co.*, Ind. , 31 N. E. Rep. 475, 21 Ins. L. J. 754. And see Rule 9.

RULE 11.

Effect of Company's Consent to Assignment of Policy.

The company's consent to an assignment of the policy imports validity, and being informed of the assignment it is put upon inquiry; prior violations of conditions or forfeitures unknown to either party are waived as against the assignee;¹ but may be otherwise if the facts forfeiting the policy are known to the assignee;² when consented to by the company with knowledge of the facts, it operates as a waiver of a

violation of any of its conditions.³ By consenting to an assignment of the policy to a person named the company may be estopped from making the objection after a loss that the assignee has no insurable interest as owner of the property insured.⁴ The amount or kind of interest may not be material so that it is a subsisting interest.⁵

1. *Hall v. Niagara Ins. Co.*, 93 Mich. 184, 53 N. W. Rep. 727. And see *Shearman v. Niagara Ins. Co.*, 46 N. Y. 526.

2. *Fire Assoc. v. Flournoy*, 84 Tex. 632, 19 S. W. Rep. 793.

3. *Manchester Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. Rep. 936; *Frane v. Burlington Ins. Co.*, 87 Iowa, 288, 54 N. W. Rep. 237, 22 Ins. L. J. 364; *Steen v. Niagara Ins. Co.*, 89 N. Y. 315. And see *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Ellis v. State Ins. Co.*, 68 Iowa, 578.

4. *Blackburn v. St. Paul F. & M. Ins. Co.*, 116 N. C. 821, 21 S. E. Rep. 922; *Shearman v. Niagara Ins. Co.*, *supra*.

5. *New England Ins. Co. v. Wetmore*, 32 Ill. 221; *Home Protection Ins. Co. v. Caldwell*, 85 Ala. 607.

RULE 12.

Assignee Must Have Insurable Interest.

The assignee of the policy, although the assignment of the policy is consented to by the insurance company, is subject to the same rules as to the necessity of the existence, allegation, and proof of an insurable interest, as was the original insured.

Fowler v. New York Indemnity Ins. Co., 26 N. Y. 422; *Hoyt v. Hartford Ins. Co.*, 26 Hun, 416, *aff'd*, 96 N. Y. 650, without opinion; *Hooper v. Hudson River Ins. Co.*, 15 Barb. 413, *aff'd*, 17 N. Y. 424; *Hanover Ins. Co. v. Brown*, 77 Md. 76; *First Nat. Bank v. Lancaster Ins. Co.*, 62 Tex. 461. And see "Insurable Interest."

RULE 13.

Assignee of Policy Takes It Subject to Conditions.

An assignee of a policy of fire insurance takes it subject to all the equities which existed between the original parties at the time of the assignment;¹ if void at the time of assignment in hands of the assignor, it is equally so in the hands of the assignee;² the assignee takes the policy subject to its conditions;³ a naked consent of the insurance company to an assignment of the policy does not necessarily make it valid;⁴ though a specific consent indorsed that the policy shall continue in force to an assignee may have that effect.⁵

1. *Wilson v. Mutual Ins. Co.*, 174 Pa. St. 554, 34 Atl. Rep. 122, 25 Ins. L. J. 549; *McCluskey v. Providence-Washington Ins. Co.*, 126 Mass. 306.

2. *Citizens' Ins. Co. v. Doll*, 35 Md. 89.

3. *Ellis v. State Ins. Co.*, 68 Iowa, 578; *Wilson v. Hakes*, 36 Ill. App. 539; *State Mutual Ins. Co. v. Roberts*, 31 Pa. St. 438. And see *Hanover Ins. Co. v. Brown*, 77 Md. 76; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513.

4. *Eastman v. Carroll County*, 45 Me. 307; *Merrill v. Farmers' Ins. Co.*, 48 Me. 285; *Citizens' Ins. Co. v. Doll*, 35 Md. 89; *McCluskey v. Providence-Washington Ins. Co.*, 126 Mass. 306.

5. *McCluskey v. Providence-Washington Ins. Co.*, 126 Mass. 306; *Tripp v. Pacific Ins. Co.*, 7 Allen, 230 (Mass.).

RULE 14.

**Assignment with Consent of Company to Purchaser of Property
— Effect.**

An assignment of the policy, with the consent of the insurance company, to a purchaser, on sale of the property covered by it, operates as a new insurance contract with the assignee, and is in effect the same as the issue of a new policy to him;¹ which may be en-

forced without regard to what occurred before the transfer, if the assignee is innocent of fraud; a past breach of condition by the original policyholder cannot be set up, even though the breach was unknown to the company at time of its consent;² defenses available against the assignor cannot be pleaded against such assignee, except when the policy never had any validity or was void in its inception or obtained by fraud;³ if the insured had no insurable interest when policy issued, he transfers no rights by assignment.⁴ And condition of the title may be such in obtaining consent to assignment to the wife of assured in fraud of creditors, as to render its concealment such a fraud on the insurance company as to render the policy void.⁵

1. *Virginia-Carolina Chemical Co. v. Insurance Co.*, 108 Fed. Rep. 451; *Re Hamilton*, 102 Fed. Rep. 683; *Continental Ins. Co. v. Munn*, 120 Ind. 30; *Manchester Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. Rep. 926, 41 N. E. Rep. 47; *Manchester Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. Rep. 1110; *Bulman v. North British & M. Ins. Co.*, 159 Mass. 118, 34 N. E. Rep. 169, 22 Ins. L. J. 668; *Hayes v. Saratoga Ins. Co.*, 81 App. Div. 287, 80 N. Y. Supp. 888; *Shearman v. Niagara Ins. Co.*, 46 N. Y. 526; *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. Rep. 839; *Bonenfant v. American Ins. Co.*, 76 Mich. 653, 43 N. W. Rep. 682; *Cummings v. Insurance Co.*, 55 N. H. 457; *Southern Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. Rep. 467; *City Ins. Co. v. Mark*, 45 Ill. 482; *Garland v. Insurance Co. N. A.*, 9 Bradw. 571 (Ill.); *Grant v. Eliot Ins. Co.*, 75 Me. 196. And see *Planters' Ins. Assoc. v. Southern Savings Co.*, 68 Ark. 8, 56 S. W. Rep. 443; *Clem v. German Ins. Co.*, 36 Mo. App. 560; *Flanagan v. Camden Ins. Co.*, 1 Dutch. 506 (N. J.); *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460.

2. *Home Ins. Co. v. Nichols*, Tex. Civ. App. , 72 S. W. Rep. 440; *Bayless v. Merchants' Ins. Co.*, 106 Mo. App. 684, 80 S. W. Rep. 209; *City Ins. Co. v. Mark*, 45 Ill. 482; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Ellis v. Insurance Co. N.*

A., 32 Fed. Rep. 646; *Continental Ins. Co. v. Munns*, 120 Ind. 30, 22 N. E. Rep. 78, 19 Ins. L. J. 57; *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460. And see *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. Rep. 839; *Hall v. Niagara Ins. Co.*, 93 Mich. 184, 53 N. W. Rep. 727; *Fire Assoc. v. Flournoy*, 84 Tex. 632, 19 S. W. Rep. 793; *Hower v. State Ins. Co.*, 58 Iowa, 51.

3. *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549, 54 N. E. Rep. 772; *Phoenix Ins. Co. v. Willis*, 70 Tex. 12; *Citizens' Ins. Co. v. Doll*, 35 Md. 89; *Froehly v. North St. Louis Ins. Co.*, 32 Mo. App. 302. And see *Eastman v. Carroll County Ins. Co.*, 45 Me. 307; *Reed v. Windsor Ins. Co.*, 54 Vt. 413; *Charleston Ins. Co. v. Neve*, 2 McM. 237 (S. C.); *Stanstead Ins. Co. v. Gooley*, 9 Rap. Jud. Que. B. R. 324.

4. *McCluskey v. Providence Ins. Co.*, 126 Mass. 306.

5. *Home Ins. Co. v. Allen*, 93 Ky. 270, 19 S. W. Rep. 743.

RULE 15.

Assignment May be Made Conditional.

An assignment of the policy made to be delivered or operative upon obtaining consent of the insurance company, and such consent is refused, the assignment cannot be claimed to affect the rights of the parties.

Smith v. Monmouth Ins. Co., 50 Me. 96; *Manley v. Insurance Co. N. A.*, 1 Lans. 20 (N. Y.).

RULE 16.

One of Several Insured May Assign His Interest.

When several distinct interests or owners are insured, an assignment by one of his interest in the policy or insurance with consent of the company is effective in creation of a new and separate insurance contract with such assignee.

Manchester Assur. Co. v. Glenn, 13 Ind. App. 365, 40 N. E. Rep. 926; *Manchester Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. Rep. 1110.

RULE 17.

Effect of General Assignment for Benefit of Creditors.

While the policy of insurance is a contract of indemnity personal with the insured and does not pass by a transfer or assignment of the property insured as incident to it, it may pass as an integral part of the insured's property, when all of it is assigned; when the insured makes an assignment for benefit of his creditors and a statute requires a construction that it includes or means a conveyance of all his property, there is no room to contend for any different intention on his part than to include in the assignment the policy of insurance and that, being without consent of the insurance company, renders the policy void.

Dube v. Mascoma Ins. Co., 64 N. H. 527, 15 Atl. Rep. 141.

RULE 18.

Effect of Adjudication in Bankruptcy.

A policy of fire insurance is in its nature assignable, and if fire occurs after an adjudication in bankruptcy of the assured, it vests by operation of law in the trustee upon his appointment and qualification.

Fuller v. New York Ins. Co., 184 Mass. 12, 67 N. E. Rep. 879.

And as to right of trustee in bankruptcy to recover insurance, see also *Traders' Ins. Co. v. Mann*, 118 Ga. 381, 45 S. E. Rep. 426.

RULE 19.

Rule as to Statement of Interest Inapplicable to Assignment of Policy.

The rule which requires the applicant for insurance to truly state his interest in the property to be insured

does not extend to the assignment of the policy while in force.

Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 368; *Cumberland Valley Protection Co. v. Mitchell*, 48 Pa. St. 374. .

RULE 20.

Assignor of Policy no Power to Impair Validity of Policy.

After the policy has been assigned with the consent of the insurance company, the assignor has no power, either by words or acts, to impair the validity of the policy in the hands of the assignee;¹ or to bind the assignee by any agreement with the insurance company as to amount of liability.²

1. *Pollard v. Somerset Ins. Co.*, 42 Me. 221; *New England Ins. Co. v. Wetmore*, 32 Ill. 221; *Muncey v. Sun Ins. Office*, 109 Mich. 542, 67 N. W. Rep. 562; *Breckenridge v. American Central Ins. Co.*, 87 Mo. 62. And see *Foster v. Equitable Ins. Co.*, 2 Gray, 216 (Mass.); *Tillou v. Kingston Ins. Co.*, 7 Barb. 570, modified 5 N. Y. 405, as to amount.

2. *American Central Ins. Co. v. Sweetser*, 116 Ind. 370, 19 N. E. Rep. 159. And see *Georgia Co-operative Fire Assoc. v. Borchardt*, Ga. , 51 S. E. Rep. 429.

RULE 21.

Insured Cannot Acquire Claim Under Void Policy by Assignment from Mortgagee.

The owner of insured property whose right to recover on the policy is lost by a sale or transfer of the property, the policy having on that account become void as to him, cannot recover thereon as an assignee of a mortgagee under a mortgagee clause attached, especially after the mortgagee's interest therein has been extinguished by payment and when the policy provides for subrogation of the insurance company to

the mortgagee's rights on payment of the insurance to him.

Lett v. Guardian Ins. Co., 52 Hun, 570, aff'd, 125 N. Y. 82, 20 Ins. L. J. 176. And see *Dircks v. German Ins. Co.*, 34 Mo. App. 31.

RULE 22.

Assignment as Between Partners.

When a partnership is insured the transfer or assignment of the interest of one partner to the other does not void the insurance.

Pierce v. Nashua Ins. Co., 50 N. H. 297; *Texas Ins. Co. v. Cohen*, 47 Tex. 406. And see this volume, chapter "Change in Interest or Title," Rule 18 *et seq.*

RULE 23.

Assignment as Security or Collateral.

The clause in the policy making it void if assigned is strictly construed and is limited in its application to absolute transfers; an assignment, transfer, or deposit with bailee as collateral security for a debt of the insured does not forfeit the insurance;¹ and although absolute on its face such an assignment may be shown to have been made as security only.² A policy may be pledged as collateral without written assignment by its delivery with such intent.³ When the policy is assigned after a fire as security for a debt, both the insured or assignor and the assignee may be proper parties to an action to recover the insurance.⁴ And when so assigned, and the company makes by indorsement the loss, if any, payable to the assignee as interest may appear, the lien thereby

created is superior to that obtained in garnishment by a subsequent creditor.⁵

1. *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417, 15 Ins. L. J. 198; *Ellis v. Kreutzinger*, 27 Mo. 311; *Key v. Continental Ins. Co.*, 101 Mo. App. 344, 74 S. W. Rep. 162; *Bibend v. Liverpool, L. & G. Ins. Co.*, 30 Cal. 78; *True v. Manhattan Ins. Co.*, 26 Fed. Rep. 83. And see *Leinkauf v. Calman*, 110 N. Y. 50, 17 N. E. Rep. 389; *Northam v. International Ins. Co.*, 45 App. Div. 177, 61 N. Y. Supp. 45, aff'd, 165 N. Y. 666, on opinion below; *Wheeling Ins. Co. v. Morrison*, 11 Leigh, 354 (Va.); *Washington Ins. Co. v. Kelly*, 32 Md. 421; *McPhillips v. London Ins. Co.*, 23 Ont. App. 524. *Contra*, *Ferree v. Oxford Ins. Co.*, 67 Pa. St. 373.

The condition in this case prohibited an assignment of the policy "or any interest in it."

2. *Matthews v. Capital Ins. Co.*, 115 Wis. 272, 91 N. W. Rep. 675; *Merrill v. Colonial Ins. Co.*, 169 Mass. 10, 47 N. E. Rep. 439, 27 Ins. L. J. 237.

3. *Dickey v. Pocomoke City Bank*, 89 Md. 280, 298, 43 Atl. Rep. 33.

4. *Alamo Ins. Co. v. Schmitt*, 10 Tex. Civ. App. 550, 30 S. W. Rep. 833.

5. *Glover v. Wells*, 140 Ill. 102, 29 N. E. Rep. 680.

As to effect of making loss payable to a creditor or third party, see Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to the Fire Insurance Contract," Rules 1 and 17.

RULE 24.

Right of Assignment.

A policy of insurance, like any other chose in action, may be transferred either absolutely or as collateral security, and in the absence of any stipulation in the policy, or any regulation of the company, by which the assured or his assignee may be bound, if the original insured remains and does not terminate his own contract with the company his assignee may collect any sum which may become payable by the company by process in the assignee's own name, if the company

has assented to the assignment, and otherwise in the name of the assured; an assignment if it leaves the assignor still interested in the contract and in the loss, does not make the insurance void, because the assignee has no insurable interest in the property.

Merrill v. Colonial Mut. Ins. Co., 169 Mass. 10, 47 N. E. Rep. 439, 27 Ins. L. J. 237. And see Rule 12.

RULE 25.

Effect of Assignment as Security — Lien.

When the policy is assigned as collateral security for a debt of the insured with an agreement that in the event of fire the assignee shall collect the money and apply same upon the debt, it operates in equity as a lien upon amount due on the policy as soon as a loss occurs, as against the assignor and all persons asserting a claim thereto under him. It is not necessary that the assignee in such a case should have any interest in the property covered by the policy, nor that the insurance company should consent to the assignment.

Bibend v. Liverpool & L. Ins. Co., 30 Cal. 78; *Key v. Continental Ins. Co.*, 101 Mo. App. 344, 74 S. W. Rep. 162; *Baughman v. Camden Mfg. Co.*, 65 N. J. Eq. 546, 56 Atl. Rep. 376. And see Rule 23.

In *Bayles v. Insurance Co.*, 3 Dutch. 163 (N. J.), it was held that an assignment of the policy as collateral security, without a transfer or conveyance of the subject-matter of the insurance, was ineffectual.

RULE 26.

When Assigned as Security Subject to Violation of Conditions by Assignor.

When a mortgagee takes or has an assignment of the policy merely as collateral security for the pay-

ment of the mortgage debt, such assignment is taken and held subject to a violation of its conditions by the insured assignor, even though subsequent to such assignment;¹ and so whenever the policy is assigned merely as collateral security.²

1. *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401; *Illinois Ins. Co. v. Fix*, 53 Ill. 151; *Swenson v. Sun Fire Office*, 68 Tex. 461, 16 Ins. L. J. 858. And see *Mechanics' Society v. Gore District Ins. Co.*, 3 Tupper, 151 (Can.).

Also Vol. 1, *Fire Insurance as a Valid Contract*, "Mortgagor and Mortgagee."

2. *Birdseye v. City Ins. Co.*, 26 Conn. 165.

RULE 27.

Assignment by Mortgagee.

The condition prohibiting an assignment of the policy has reference to a transfer of the contract of insurance; an assignment, by a mortgagee to whom the loss is made payable, of "his right and interest in the policy," is not an assignment of the policy, but is merely an assignment of his right to receive the proceeds, if any, under it.

Whiting v. Burkhardt, 178 Mass. 535, 60 N. E. Rep. 1, 52 L. R. A. 788. And see *Sun Fire Office v. Fraser*, 5 Kans. App. 63, 47 Pac. Rep. 327. And see Rule 1.

RULE 28.

Assignment After Loss.

Any clause or condition in a policy of insurance prohibiting its assignment after a loss is inoperative and void; the insured has legal right to assign the policy or his claim thereunder after a fire;¹ but as-

sured who has parted with all interest in the property can transfer no rights by assignment after a loss;² an assignment after a loss is taken subject to all defenses which might be made as against the insured or assignor³ and to the company's right to rebuild.⁴ The insurance company remains liable to assignee of the claim if it pays the insured after notice of the assignment.⁵ An unaccepted assignment amounts to nothing and does not prevent the insured from recovering the whole amount of the insurance.⁶

1. *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 11 Ins. L. J. 126; *Frels v. Little Black Farmers' Ins. Co.*, 120 Wis. 590, 98 N. W. Rep. 522; *Nease v. Aetna Ins. Co.*, 32 W. Va. 283, 9 S. E. Rep. 233; *Combs v. Shrewsbury Ins. Co.*, 5 Stew. 512 (N. J.); *Watertown Ins. Co. v. Grover & Baker Sewing Machine Co.*, 41 Mich. 131; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. 402, 40 Barb. 292, aff'd, 1 Abb. Ct. App. Dec. 316; *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Mellen v. Hamilton Ins. Co.*, 5 Duer, 101, aff'd, 17 N. Y. 609; *Perry v. Merchants' Ins. Co.*, 25 Ala. 355; *Walters v. Washington Ins. Co.*, 1 Iowa, 404; *Carter v. Humboldt Ins. Co.*, 12 Iowa, 287; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Greene v. Republic Ins. Co.*, 84 N. Y. 572; *Hamilton v. East Tex. Ins. Co.*, 1 Tex. Ct. App. Civ. Cas. 448; *Indian River State Bank v. Hartford Ins. Co.*, Fla. , 35 So. Rep. 228; *Georgia Co-operative Fire Assoc. v. Borchardt*, Ga. , 51 S. E. Rep. 429.

2. *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 308.

3. *Johnston v. Phoenix Ins. Co.*, 39 Md. 233. And see *Home Ins. Co. v. Hauslein*, 60 Ill. 521; *Burger v. Farmers' Ins. Co.*, 71 Pa. St. 422; *Barrett v. Union Ins. Co.*, 7 Cush. 175 (Mass.); *Pupke v. Resolute Ins. Co.*, 17 Wis. 378; *Joy v. Liverpool, L. & G. Ins. Co.*, 32 Tex. Civ. App. 433, 74 S. W. Rep. 822.

4. *Tolman v. Manufacturers' Ins. Co.*, 1 Cush. 73 (Mass.).

5. *Hall v. Dorchester Ins. Co.*, 111 Mass. 53.

6. *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238.

RULE 29.

Effect of Assignment After Loss to a Trustee.

An assignment of the policy after a loss to a trustee to collect the amount of the insurance may be valid in

legal effect as a general assignment for benefit of creditors.

Westchester Ins. Co. v. Blackford, 51 S. W. Rep. 978 (Ind. Terr.).

RULE 30.

Assignment After Loss Induced by False Representations.

When the insured is induced by false representations of a representative of the insurance company as to its ability to pay the amount due, to make an assignment of the policy after a fire for less than the claim under it, such assignment will be decreed void in equity.

Derrick v. Lamar Ins. Co., 74 Ill. 404. And see *Burnham v. Lamar Ins. Co.*, 79 Ill. 160.

RULE 31.

Assignment After Fire Includes Right to Reformation.

An assignment of the policy and interest in it after the fire transfers to the assignee the right to reformation of it, and suit may be maintained for such purpose by the assignee.

Benesh v. Mill Owners' Ins. Co., 103 Iowa, 465, 72 N. W. Rep. 674.

CHAPTER SIXTH.

Relating to Use or Occupation.

- TITLE 1.** Operation of manufacturing establishment.
2. Increase of hazard.
 3. Alterations or repairs by mechanics.
 4. Illuminating gas or vapor and prohibited articles.
 5. Vacant or unoccupied.

TITLE I.

Operation of Manufacturing Establishment.

- RULE**
1. As imposed by contract.
 2. Violation of condition voids policy — Not revived by subsequent operation — Policy may be suspended by special provision.
 3. Provision as to limitation of night work substantial.
 4. What is a manufacturing establishment.
 5. Establishment not in operation when policy issues.
 6. Insured's custom does not relieve him of necessity of procuring consent of the insurance company.
 7. As affected by usage or custom.
 8. Temporary cessation of operation is not ceasing to operate.
 9. Partial cessation of operation.
 10. Stoppage of machinery is not of itself a ceasing to operate.
 11. When a mill is "shut down"—Opinion evidence.
 12. No cessation if premises continue same as when policy issues.
 13. Effect of permitted repairs and alterations.
 14. Keeping a watchman no answer to violation of condition.
 15. Construction affected by character and use of property — Presumption as to knowledge of company.
 16. Waiver or estoppel when policy issues — After its issue — Effect of written permission to run nights.
 17. When policy not divisible.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than 10 o'clock, or if it cease to be operated for more than ten consecutive days.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

The standard form of policy prescribed in Michigan is the same, except there is added:

"Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.

The standard form of policy prescribed in:

Maine,
Massachusetts,

Minnesota,

provides that:

"This policy shall be void if it (the premises insured) be a manufacturing establishment, running in whole or in part extra time, except that such establishments may run in whole or in part extra hours not later than 9 o'clock, P. M., or if such establishments shall cease operation for more than thirty days without permission in writing indorsed hereon."

The standard form of policy prescribed in New Hampshire provides:

"This policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipu-

* See note to "Concealment," Rule 1, page 2.

lated against, as follows: * * * 'if it (premises insured) be a manufacturing establishment in which the works or machinery are operated more than the customary or legal working hours, or all night, without the written or printed assent of this company thereto; except that permission is hereby given to operate machinery extra hours not later than 10 o'clock, P. M., for the purpose of equalizing work, a competent man, other than the regular watchman, being kept in charge of those rooms in which shafting and belts are running but where the machinery is not at work; or if such establishment shall cease operation for more than thirty days without permission in writing indorsed hereon.' It is furthermore provided by statute made part of the policy: 'a change in the property insured or in its use or occupation or a breach of any of the terms of the policy by the insured, shall not affect the policy except while the change or breach continues.'"

The standard form of policy prescribed in South Dakota provides:

"This policy shall be void if the subject of the insurance be a manufacturing establishment and it be operated in whole or in part at night later than 10 o'clock, or if it cease to be operated for more than twenty consecutive days without permission in writing indorsed hereon."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

Many of the old forms simply provided in effect that if the mill or factory should "cease to be operated," that the policy should become void, and the courts held that it meant a permanent cessation and had no application to a temporary suspension of work.

Poss v. Western Assur. Co., 7 Lea, 704 (Tenn.); *Lebanon Ins. Co. v. Leathers*, Pa. St. , 8 Atl. Rep. 424, 16 Ins. L. J. 977; *American Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131, 17 N. E. Rep. 771; *City Planing & Shingle Mill Co. v. Merchants' Ins. Co.*, 72 Mich. 654, 40 N. W. Rep. 777. And see *German-American Ins. Co. v. Steiger*, 109 Ill. 254.

The specific time limitation in the condition as now worded would seem to render inapplicable preceding cases and the reasoning or construction upon which the opinions and decisions therein were founded.

RULE 2.

Violation of Condition Voids Policy — Not Revived by Subsequent Operation — Policy May be Suspended by Special Provision.

Violation of the condition by the insured, without consent of the insurance company, voids the policy;¹ a breach makes the policy immediately and wholly void without regard to temporary operation within ten days immediately preceding the fire;² but this does not prevent the company from temporarily suspending the policy by special provision or condition.³

1. *Strause v. Palatine Ins. Co.*, 128 N. C. 64, 38 S. E. Rep. 256; *Cronin v. Fire Assoc.*, 119 Mich. 74, 77 N. W. Rep. 648; subsequent appeal, 123 Mich. 277, 82 N. W. Rep. 45, 86 N. W. Rep. 1028; *Reardon v. Faneuil Hall Ins. Co.*, 135 Mass. 121; *El Paso Reduction Co. v. Hartford Ins. Co.*, 121 Fed. Rep. 937; *Brehm Lumber Co. v. Svea Ins. Co.*, 36 Wash. 520, 79 Pac. Rep. 34.

2. *Cronin v. Fire Assoc.*, *supra* (see now Rule 1, Michigan standard form).

3. *Edwards v. Planters' Fire Assoc.*, 111 Ga. 449, 36 S. E. Rep. 755.

RULE 3.

Provision as to Limitation of Night Work Substantial.

The condition that a factory shall not be operated later than 10 o'clock at night is a substantial provision of the contract, and its violation voids the policy.

Alspaugh v. British-American Ins. Co., 121 N. C. 290, 27 Ins. L. J. 441, 28 S. E. Rep. 415.

RULE 4.

What is a Manufacturing Establishment.

Insured machinery does not necessarily constitute a manufacturing establishment¹ or a mill or factory;²

but machines, machinery, tools, etc., may be so used and insured as to constitute a manufacturing establishment or a part of such establishment.³ A flourmill is a manufacturing establishment.⁴ A manufacturing establishment will not be assumed from a doubtful or ambiguous description; the facts must be specifically pleaded by the insurance company.⁵

1. *Phenix Ins. Co. v. Holcomb*, 57 Nebr. 622, 78 N. W. Rep. 300, 28 Ins. L. J. 238.

2. *Halpin v. North American Ins. Co.*, 120 N. Y. 73, 23 N. E. Rep. 989, 19 Ins. L. J. 455.

3. *Stone v. Howard Ins. Co.*, 153 Mass. 475, 27 N. E. Rep. 6, 11 L. R. A. 771.

4. *Carlin v. Western Assur. Co.*, 57 Md. 515, 12 Ins. L. J. 388.

Many of the old forms of policy used the words "mill or factory." See *Halpin v. North American Ins. Co.*, *supra*, and cases in note to Rule 1.

And see Rule 1, and note the change in language to "Manufacturing establishment."

5. *Queen Ins. Co. v. Excelsior Milling Co.*, Kans., 76 Pac. Rep. 423.

RULE 5.

Establishment not in Operation When Policy Issues.

If the establishment is not in operation when the policy issues, it cannot, after its issue, continuing idle, "cease to be operated" to bring the case within the operation of the condition providing for forfeiture of the insurance upon that ground.

Louck v. Orient Ins. Co., 176 Pa. St. 638, 35 Atl. Rep. 247, 33 L. R. A. 712. And see Rule 12.

RULE 6.

Insured's Custom Does not Relieve Him of Necessity of Procuring Consent of the Insurance Company.

The special habit or custom of the insured to cease operation of his factory during the dull season or a general custom of manufacturers to do the same thing does not affect the condition of the policy, nor dispense with the necessity of obtaining the consent of the insurance company if such cessation of operation continues beyond the specified or prescribed time.

Stone v. Howard Ins. Co., 153 Mass. 475, 27 N. E. Rep. 6, 11 L. R. A. 771.

RULE 7.

As Affected by Usage or Custom.

A permit for a sawmill to remain idle "during the winter season" is subject to evidence of usage in construction of the words "winter season" and their extent; the presumption is that the company understood the local meaning of the term used, and the burden of proof that the mill was idle later than the winter season rests on the insurance company.

Barker v. Citizens' Ins. Co., Mich. , 99 N. W. Rep. 866.

RULE 8.

Temporary Cessation of Operation is not Ceasing to Operate.

A mere temporary cessation of the operation of the machinery in a sawmill by reason of sickness, break down, low water, or other unavoidable cause, without any intention by the insured to cease operating it, is

not a ceasing to operate it within meaning of the condition.

Ladd v. Aetna Ins. Co., 147 N. Y. 478, 42 N. E. Rep. 197, aff'g 70 Hun, 490, 24 N. Y. Supp. 384; *Rosencrans v. North American Ins. Co.*, 66 Mo. App. 352; *Ehlers v. Aurora Ins. Co.*, 19 Pa. Co. Ct. 165.

RULE 9.

Partial Cessation of Operation.

A manufacturing establishment does not cease to be operated, merely by ceasing to perform any one of the many things required to be done in its operation;¹ though a forfeiture may not be saved by the mere fact that some work is done on the premises.²

1. *American Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131, 17 N. E. Rep. 771. And see *Allemania Ins. Co. v. White*, Pa. St. , 11 Atl. Rep. 96; *Central Montana Mines Co. v. Firemen's Fund Ins. Co.*, 92 Minn. 223, 99 N. W. Rep. 1120.
2. *Brehm Lumber Co. v. Svea Ins. Co.*, 36 Wash. 520, 79 Pac. Rep. 34.

RULE 10.

Stoppage of Machinery is not of Itself a Ceasing to Operate.

A factory does not cease to be operated merely because the machinery stops, when a foreman or employee remains in charge and occupation, putting together and making sale of engines and other articles.

Bole v. New Hampshire Ins. Co., 159 Pa. St. 53, 28 Atl. Rep. 205, 23 Ins. L. J. 857.

RULE 11.

When a Mill is "Shut Down" — Opinion Evidence.

When a mill is idle and not running for more than thirty days before the fire, it is "shut down" within

the meaning of a clause in the policy, requiring written permission in that event, and the opinion of a witness that the mill was not shut down so long, as they were shipping lumber, has no effect as expert evidence to the contrary;¹ an entire plant insured is not "shut down" by closing of a part or partial or temporary suspension.²

1. *McKenzie v. Scottish Union & N. Ins. Co.*, 112 Cal. 548, 44 Pac. Rep. 922, 25 Ins. L. J. 561.

2. *Central Montana Mines Co. v. Firemen's Fund Ins. Co.*, 92 Minn. 223, 99 N. W. Rep. 1120.

RULE 12.

No Cessation if Premises Continue Same as When Policy Issues.

It cannot be claimed that there is a ceasing to operate if the use of the premises continues the same as it was at the time policy issued.

Lebanon Ins. Co. v. Erb, 112 Pa. St. 149; *Humphrey v. Hartford Ins. Co.*, 15 Blatchf. 504 (U. S. Cir.). See Rule 5.

RULE 13.

Effect of Permitted Repairs and Alterations.

Exercise by the insured of the privilege granted in the policy to make repairs and alterations, requiring a temporary stoppage or suspension of operation, does not render the policy void;¹ unless there is a specific provision in the policy that it is suspended until work is resumed.²

1. *American Ins. Co. v. Brighton Cotton Mfg. Co.*, 24 Ill. App. 149, aff'd, 125 Ill. 131, 17 N. E. Rep. 771.

2. *Day v. Mill Owners' Ins. Co.*, 70 Iowa, 710.

RULE 14.

Keeping a Watchman no Answer to Violation of Condition.

When the business is discontinued and the establishment ceases to be operated for manufacturing purposes, it is no answer to the company's claim of forfeiture thereby, that the insured kept a watchman constantly on the premises.

Dover Glass Works *v.* American Ins. Co., Del. , 29
Atl. Rep. 1039, 24 Ins. L. J. 12.

RULE 15.

Construction Affected by Character and Use of Property — Presumption as to Knowledge of Company.

When the character and use of the property insured is known to the company, and in view of the known use and character of the manufacturing business conducted on the premises, continuous operation is not contemplated by the company and the insured during a portion of the time covered by the policy, the condition is affected thereby and a forfeiture of the insurance does not necessarily result;¹ an insurance company issuing its policy upon a manufacturing plant may be presumptively chargeable with knowledge of the usual and customary methods of conducting the business.²

1. Morotuck Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. Rep. 487; Bellevue Roller Mill Co. *v.* London & Lancashire Ins. Co., 4 Idaho, 307, 39 Pac. Rep. 196, 24 Ins. L. J. 331.

2. McKeesport Machine Co. *v.* Ben Franklin Ins. Co., 173 Pa. St. 53, 34 Atl. Rep. 16. And see Virginia F. & M. Ins. Co. *v.* Thomas, 90 Va. 658, 19 S. E. Rep. 451.

See also this volume "Vacant or Unoccupied."

RULE 16.

Waiver or Estoppel When Policy Issues — After Its Issue — Effect of Written Permission to Run Nights.

While issue and delivery of the policy with knowledge by the company or its agent of facts constituting a breach of the condition may operate as a waiver or estoppel;¹ it may be questioned whether the language of the condition does not have reference to the future, that is, to a state of facts arising after issue of the policy, and if it be so construed and applied, the agent, in absence of express authority, does not have power to orally dispense with or waive the condition.² A written permission to run nights operates as a waiver of previous running.³

1. *Thackery Mining Co. v. American Ins. Co.*, 62 Mo. App. 293. And see *Improved Match Co. v. Michigan Ins. Co.*, 122 Mich. 256, 80 N. W. Rep. 1088; *London & Lancashire Ins. Co. v. Gerteson*, Ky., 51 S. W. Rep. 617; *Germania Ins. Co. v. Wingfield*, 57 S. W. Rep. 456 (Ky.); *American Central Ins. Co. v. McCrea*, 8 Lea, 513 (Tenn.); *Humphrey v. Hartford Ins. Co.*, 15 Blatchf. 504 (U. S. Cir.).

See also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 16.

2. See Rule 1.

Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 20, 27, 28. And see this volume, "Agents."

3. *North Berwick Co. v. New England Ins. Co.*, 52 Me. 336.

RULE 17.

When Policy not Divisible.

When a violation of the condition affects the entire property insured the policy is not divisible.

Brehm Lumber Co. v. Svea Ins. Co., 36 Wash. 523, 79 Pac. Rep. 34, citing *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548.

See Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 26.

TITLE II.

Increase of Hazard.

- RULE**
1. As imposed by contract.
 2. Violation of condition voids policy though fire caused by independent means.
 3. Change does not mean increase — Burden of proof.
 4. Condition has reference to future — Continuation of existing use.
 5. Knowledge or control essential element — Acts of tenant.
 6. Increase of risk as affected by time — Temporary or permanent.
 7. Violation of condition renders policy void or voidable — Not merely suspended — Contract not revived by acts of insured.
 8. Pleasure of insured cannot legally be substituted for obligations of contract.
 9. Increase of risk temporarily suspends policy.
 10. Balancing or comparison of risk not admissible.
 11. Effect of making ordinary repairs — Unauthorized alterations — Question of fact.
 12. Materiality of written application — Violation of specific permission as to use of prohibited article.
 13. Effect of consent to removal to new location.
 14. As affected by other clauses or conditions in the policy — Application of clause against increase of hazard.
 15. Presumption as to assumption of risk.
 16. Construction of builder's risk.
 17. Construction limited by existing or contemplated uses or occupation.
 18. Construction of words "increase of risk."
 19. As affecting construction of warranty.
 20. Question of increase of risk as affected by acts in violation of law.
 21. Interest of mortgagee — Effect of mortgagee clause.
 22. No application to liens or judgments — May be question of fact.
 23. As affected by rate of premium — Evidence — Test.
 24. Opinion evidence — Experts.
 25. When expert testimony admissible.
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 27. Waiver or estoppel.
 28. Knowledge or notice to company's agent after issue of policy no waiver.

- RULE 29.** Effect of demand and receipt of additional premium — Insured has reasonable time to comply with special condition.
30. Pleading — Burden of proof.
31. Increase of hazard may be question of law.
32. No inferences in favor of an insurance company.
33. When proper to set aside verdict.
34. Question of increase of hazard is ordinarily one of fact.
35. What recognized as a fact which may increase hazard — Illustrative cases.
36. What is not an increase of hazard — Illustrative cases.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the hazard be increased by any means within the control or knowledge of the insured.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island,
Wisconsin.

The standard form of policy prescribed in Michigan is the same, except there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.”

The standard form of policy prescribed in:

Maine,

Massachusetts,

provides that “this policy shall be void, if, without the assent in writing or in print of the company, the situation or circumstances affecting the risk shall, by or with the knowledge, advice,

* See note to “Concealment,” Rule 1, page 2.

agency, or consent of the insured, be so altered as to cause an increase of such risks."

The standard form of policy prescribed in Minnesota provides that "the policy shall be void, if, without the assent of the company, the situation or circumstances affecting the risk, shall, by or with the knowledge, advice, agency, or consent of insured, be so altered so as to cause an increase of such risks."

The standard form of policy prescribed in New Hampshire provides, "this policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: if, without the assent in writing or in print of the company, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk." It is furthermore provided by statute made part of the policy: "a change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, shall not affect the policy except while the change or breach continues."

The standard form prescribed in South Dakota provides: "this policy shall be void, if, without the assent of the company, the situation or conditions affecting the insured property shall be altered so as to materially increase the hazard, if such increase in hazard be occasioned by the act or agency of the insured."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

Section 3643 of the Ohio Revised Statutes providing "that any company insuring a building, shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made and the insurable value thereof to be fixed by such agent; and that in the absence of any change increasing the risk without the consent of the company, and also on intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal shall be paid" has no application to defenses founded upon specific conditions as to title but is limited in operation to a building itself, its condition, and situation as regards surrounding objects and its value; and the word "change" must be confined in its reference to the same and to those matters which were open to the sight and observation of the agent.

Webster v. Dwelling-House Ins. Co., 53 Ohio St. 558, 7 Ohio C. C. 511.

See Vol. 1, Fire Insurance as a Valid Contract, "Statutory Provisions," Ohio.

RULE 2.

Violation of Condition Voids Policy Though Fire Caused by Independent Means.

An increase of the risk by means within the knowledge or control of the insured, or a violation of the condition, voids the policy, according to its terms;¹ though the fire may have been occasioned by some wholly independent cause.²

1. *Dodge County Ins. Co. v. Rogers*, 12 Wis. 337; *Williams v. People's Ins. Co.*, 57 N. Y. 274; *Cole v. Germania Ins. Co.*, 99 N. Y. 36, 14 Ins. L. J. 453; *Roberts v. Chenango Ins. Co.*, 3 Hill, 501 (N. Y.); *Murdock v. Chenango Ins. Co.*, 2 N. Y. 210; *People's Ins. Co. v. Spencer*, 53 Pa. St. 353; *Pottsville Ins. Co. v. Horan*, 89 Pa. St. 438; *Allen v. Massasoit Ins. Co.*, 99 Mass. 160; *Davis v. Western Home Ins. Co.*, 81 Iowa, 496, 46 N. W. Rep. 1073; *Harris v. Columbiana Ins. Co.*, 4 Ohio St. 285. And see *Hoffecker v. New Castle Ins. Co.*, 5 Houst. 101 (Del.).

2. *Williams v. People's Ins. Co.*, *supra*; *Germania Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. Rep. 868; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. Rep. 534; *Daniels v. Equitable Ins. Co.*, 50 Conn. 551. And see *Gardner v. Piscataquis Ins. Co.*, 38 Me. 439.

RULE 3.

Change Does not Mean Increase — Burden of Proof.

A change in the risk does not necessarily mean an increase in the risk. The burden of establishing such increase rests upon the insurance company.

Greenlee v. North British & M. Ins. Co., 102 Iowa, 427, 71 N. W. Rep. 534, 26 Ins. L. J. 801. And see *Adair v. Southern Mutual Ins. Co.*, 107 Ga. 297, subsequent appeal *sub nom.* *Southern Mutual Ins. Co. v. Hudson*, 113 Ga. 434, 38 S. E. Rep. 964.

RULE 4.

Condition Has Reference to Future — Continuation of Existing Use.

The clause in regard to increase of risk has reference to the future and not to existing conditions of the property insured.¹ A continuation of an existing use or condition does not constitute an increase of risk.²

1. *Straker v. Phoenix Ins. Co.*, 101 Wis. 413, 77 N. W. Rep. 752, 28 Ins. L. J. 143. And see *Williams v. People's Ins. Co.*, 57 N. Y. 274.

2. *Whitney v. Black River Ins. Co.*, 72 N. Y. 117. And see *Mayor v. Exchange Ins. Co.*, 9 Bosw. 424 (N. Y.); *Mayor v. Hamilton Ins. Co.*, 10 Bosw. 537, aff'd, 39 N. Y. 45; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. Rep. 333, 19 Ins. L. J. 966; *Kimball v. Aetna Ins. Co.*, 9 Allen, 540 (Mass.); *Schmidt v. Peoria F. & M. Ins. Co.*, 41 Ill. 295.

RULE 5.

Knowledge or Control Essential Element — Acts of Tenant.

Knowledge or control of the insured is an essential element in establishing an increase of the risk making the policy void;¹ unless the condition omits the words "knowledge or control;"² when known to the insured he is responsible for acts of other or third parties increasing the risk;³ but when there is a distinct prohibited use by the terms of the contract or policy, such prohibited use by a tenant of the insured may void the policy, regardless of notice or knowledge thereof on part of the insured;⁴ the use by a tenant of insured of a gasoline stove, without the knowledge of the latter, is not such an increase of risk as will void the policy.⁵ And so when the tenant erects an addition to the building insured.⁶ But when the insured allows an

increase of risk in part of the building occupied by tenants, he cannot escape the consequences by showing that he used and occupied another part only.⁷

1. *East Texas Ins. Co. v. Kempner*, 12 Tex. Civ. App. 534, 34 S. W. Rep. 393, writ of error denied 35 S. W. Rep. 1069; *Northern Assur. Co. v. Crawford*, 24 Tex. Civ. App. 574, 59 S. W. Rep. 916; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. Rep. 333, 19 Ins. L. J. 966; *Waggonick v. Westchester Ins. Co.*, 34 Ill. App. 629; *German Ins. Co. v. Wright*, 6 Kans. App. 611, 49 Pac. Rep. 704; *Nebraska Ins. Co. v. Christensen*, 29 Nebr. 572, 45 N. W. Rep. 924; *Breuner v. Ins. Co.*, 51 Cal. 101. And see *Rife v. Lebanon Ins. Co.*, 115 Pa. St. 530; *Niagara Ins. Co. v. Miller*, 120 Pa. St. 504.

2. *Long v. Beeber*, 106 Pa. St. 466.

3. *Jauvrin v. Rockingham Ins. Co.*, 70 N. H. 35, 46 Atl. Rep. 686. And see *McKee v. Susquehanna Ins. Co.*, 135 Pa. St. 544, 19 Atl. Rep. 1067; *Alston v. Greenwich Ins. Co.*, 100 Ga. 282, 29 S. E. Rep. 266; *German Ins. Co. v. Wright*, 6 Kans. App. 611, 49 Pac. Rep. 704. In *North British & M. Ins. Co. v. Union Stockyard Co.*, Ky., 87 S. W. Rep. 285, the court construes the language of the policy (Rule 1) as meaning "if the insured is ignorant, although a matter which he might have controlled had he known it, the policy is not affected; or although he had knowledge, yet if it was a thing beyond his control, neither is it affected."

4. *Concordia Ins. Co. v. Johnson*, 4 Kans. App. 7, 45 Pac. Rep. 722.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 15.

5. *East Texas Ins. Co. v. Kempner*, 12 Tex. Civ. App. 534, 34 S. W. Rep. 393, writ of error denied 35 S. W. Rep. 1069.

6. *Nebraska Ins. Co. v. Christensen*, 29 Nebr. 572, 45 N. W. Rep. 924.

7. *Appleby v. Firemen's Fund Ins. Co.*, 45 Barb. 454.

Some of the old forms required control of the insured and omitted the word "knowledge." *Williams v. People's Ins. Co.*, 57 N. Y. 279. Others required advice, agency, or consent of insured. *Allen v. Massasoit Ins. Co.*, 99 Mass. 160.

Many of the old forms of policy provided that "if the above mentioned premises shall, during this insurance, be occupied or used so as to increase the risk, or by the erection of any building or buildings, or by the use or occupation of neighboring

premises, this company after notice given to the assured, or his, or her, or their representative, of their intention to terminate the insurance, will refund a rebatable proportion of the premium," and it was held that this condition was intended to provide for increase of risk by acts of third persons over whom the insured had no control.

Williams v. People's Ins. Co., 57 N. Y. 274. And see *Gardiner v. Piscataquis Ins. Co.*, 38 Me. 439; *Joyce v. Maine Ins. Co.*, 45 Me. 168.

And some provided for notice to be given by the insured of an increase of risk and increase of premium or cancellation of the policy at option of the company.

See *Residence Ins. Co. v. Hannawold*, 37 Mich. 103; *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553.

And some required by special clause action by the company.

Farmers' Ins. Co. v. Schaffer, 82 Md. 377, 33 Atl. Rep. 728, 25 Ins. L. J. 552.

It is suspected, though perhaps not capable of demonstration, that these and similar cases are the foundation of the doctrine prevailing in few of the States as to the effect of omission to cancel as evidence of waiver. The courts do not always note or distinguish the difference in language, and some of the old forms in terms provided against "act of the assured, his agent, or tenant" in increase of risk.

See *Gilliat v. Pawtucket Ins. Co.*, 8 R. I. 282.

RULE 6.

Increase of Risk as Affected by Time — Temporary or Permanent.

A clause or condition against an increase of risk is not ordinarily construed as applicable to a merely occasional or a temporary use,¹ which ceases before the fire and in no way contributes to or causes the loss,² but as contemplating something permanent or habitual;³ though it is not always necessary that the increase of risk should be permanent or habitual to void the policy;⁴ each case must be decided upon its particular facts and circumstances;⁵ a temporary increase of risk arising from manner of use of premises, which is not a casual, inadvertent, or inevitable thing,

may void the policy;⁶ whether of a permanent character may be determined by the particular requirements of the special use.⁷

1. *Gates v. Madison Ins. Co.*, 5 N. Y. 469; *Loud v. Citizens' Ins. Co.*, 2 Gray, 221 (Mass.); *Westchester Ins. Co. v. Foster*, 90 Ill. 121; *Kircher v. Milwaukee Mechanics' Ins. Co.*, 74 Wis. 470, 43 N. W. Rep. 487, 19 Ins. L. J. 205.

And see Rules 7, 8, 9, and *notes*.

2. *Kircher v. Milwaukee Mechanics' Ins. Co.*, *supra*.

3. *Leggett v. Aetna Ins. Co.*, 10 Rich. Law 202 (S. C.); *Allemania Ins. Co. v. Pittsburg Exposition Soc.*, Pa. St. , 11 Atl. Rep. 572. And see *Shaw v. Robberds*, 6 Adolph & Ellis, 75, 33 Eng. C. L. 12.

4. *Harris v. Columbiana Ins. Co.*, 4 Ohio St. 285. And see Rule 7 *et seq.*

5. *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 So. Rep. 899, 19 Ins. L. J. 45. And see *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72 (N. Y.).

6. *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116. And see *Glen v. Lewis*, 8 Wels., Hurl. & Gord. 607 (Eng.).

7. *Wilson v. Union Mut. Ins. Co.*, Vt. , 55 Atl. Rep. 662.

RULE 7.

Violation of Condition Renders Policy Void or Voidable — Policy not Merely Suspended — Contract not Revived by Acts of Insured.

If, as matter of fact, the risk is increased at any time during the life of the policy it becomes void by its terms or voidable at option of the insurance company, notwithstanding such increase of hazard may have ceased to exist before the fire, and does not contribute to or cause it;¹ a subsequent condition, when broken, vitiates the policy, even though the breach of condition may not continue up to the time when the loss by fire occurs.² When a contract stipulates that it shall become void upon the happening of an event, and such

event is brought about by one of the parties thereto, the contract as to such party is immediately terminated, and cannot, by his acts, without the consent of the other party, be revived or vitalized.³

1. *Imperial Ins. Co. v. Coos County*, 151 U. S. 452, 23 Ins. L. J. 282; *Hill v. Middlesex Assur. Co.*, 174 Mass. 542, 55 N. E. Rep. 319; *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116.

2. *Hoover v. Mercantile Ins. Co.*, 93 Mo. App. 111, 69 S. W. Rep. 42, citing *Imperial Ins. Co. v. Coos County*, *supra*, and *Kyte v. Assurance Co.*, 149 Mass. 116.

3. *German Ins. Co. v. Russell*, 65 Kans. 373, 69 Pac. Rep. 345. And see *Concordia Ins. Co. v. Johnson*, 4 Kans. App. 7, 45 Pac. Rep. 722.

Some of the old forms of policy provided in terms for a "suspension" of the insurance during any increase of risk from specified causes. See *Mayor v. Hamilton Ins. Co.*, 10 Bosw. 537, *aff'd*, 39 N. Y. 45; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221.

While perhaps not capable of exact demonstration it is suspected that these and kindred cases are the foundation of the doctrine as expressed in Rule 9, the courts not always recognizing or considering the difference in language.

See that Rule and note.

RULE 8.

Pleasure of Insured Cannot Legally be Substituted for Obligations of Contract.

The contract of insurance ends the moment the condition as to prohibited articles is legally violated, without regard to time or cause of fire, and cannot be revived again without consent, unless the insurance company by some act or line of conduct, waives the breach. The reason of this rule is that to hold otherwise would be to substitute the pleasure of the insured for the legal obligations of the contract, as he could

violate the condition, subject the insurance company to increase of the risk, and revive the contract at will.

Mead v. Northwestern Ins. Co., 7 N. Y. 530. See and compare Rule 9, and previous Rules.

RULE 9.

Temporary Increase of Risk Suspends Policy.

Though there be a change of risk by reason of an increased hazard, which would avoid the policy if declared void by the company, yet when the company has not declared the policy forfeited, and the cause for the increased hazard no longer exists, and there is no increased hazard by reason of former changed conditions, then, the policy being for insurance for a certain period, the contract of insurance will be construed, and the fact determined whether there was an increased risk at the time of the fire which in any manner was conducive to the loss. If a loss occurs during the increased hazard a recovery will be defeated. If a former increase of hazard has ceased to exist, and that increase of hazard at that former time in no way has affected the risk when the loss occurs, no reason exists why a forfeiture should result from a cause which occasions no damage.

Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. Rep. 255, rev'g 59 Ill. App. 162, but not on this point; *Crete Farmers' Ins. Co. v. Miller*, 70 Ill. App. 599; *Schmidt v. Peoria F. & M. Ins. Co.*, 41 Ill. 295. And see *Ohio Farmers' Ins. Co. v. Burget*, 65 Ohio St. 119, 61 N. E. Rep. 712; *Kennefick-Hammond Co. v. Norwich Union Fire Assoc.*, Mo. App. , 80 S. W. Rep. 694; *Adair v. Southern Mutual Ins. Co.*, 107 Ga. 297, 33 S. E. Rep. 78, 28 Ins. L. J. 510; *North British & M. Ins. Co. v. Union Stockyards Co.*, Ky. , 87 S. W. Rep. 285, *Johnston v. Dominion Grange Ins. Co.*, 23 Ont. App. 729.

See previous Rules.

Many of the old forms of policies in terms provided that the policy should be suspended while prohibited articles were being used.

Hynds v. Schenectady Ins. Co., 11 N. Y. 554.

And the same form was probably involved in *Gates v. Madison Ins. Co.*, 5 N. Y. 469, 478, though it is not quoted in the report.

Putnam v. Commonwealth Ins. Co., 18 Blatchf. 368 (U. S. Cir.); *Maryland Ins. Co. v. Whiteford*, 31 Md. 219, 228; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. 9 (Ky.).

Others provided that "any change increasing the risk" should make the policy void, and the word "change" was construed as referring to a permanent rather than a temporary change.

Adair v. Southern Mutual Ins. Co., 107 Ga. 297, subsequent appeal *sub nom.* *Southern Mutual Ins. Co. v. Hudson*, 113 Ga. 434, 38 S. E. Rep. 964.

And others again did not contain any clause or condition making the policy void for an increase of risk, and it was held that its validity depended upon state of facts existing at time of loss.

Mutual Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407.

It is suspected, though not capable of exact demonstration, that the rule stated above in the text has its origin in these cases. The courts have not always noted the effect of change or omission in language.

RULE 10.

Balancing or Comparison of Risk not Admissible.

When, as matter of fact, the risk is increased by a specific circumstance, such as in the erection of an adjoining building, the legal effect or consequence is not avoided by real or fancied lessening of the risk in removal of other buildings;¹ but in case of an addition or extension to building insured the risk may in fact be decreased by the improvements made in connection with the extension.² If there are two or more changes unconnected with each other, and one has increased the risk, it is no answer to a plea for forfeiture of the

insurance to say that something else has diminished it,³ or that the insured occupied only a part of the premises described in the policy.⁴

1. *Pottsville Ins. Co. v. Horan*, 89 Pa. St. 438. And see *Heneker v. British America Assur. Co.*, 13 Up. Can. C. P. 99; *Lomas v. British America Assur. Co.*, 22 Up. Can. Q. B. 310.

2. *Meyer v. Queens Ins. Co.*, 41 La. Ann. 1000, 6 So. Rep. 899, 19 Ins. L. J. 45.

3. *Albion Lead Works v. Williamsburg City Ins. Co.*, 2 Fed. Rep. 479, 9 Ins. L. J. 435.

4. *Appleby v. Firemen's Fund Ins. Co.*, 45 Barb. 454.

RULE II.

Effect of Making Ordinary Repairs — Unauthorized Alterations — Question of Fact.

The condition against an increase of risk is not so construed as to forbid the making of ordinary repairs in a reasonably safe way, even though it involves a temporary increase of risk;¹ thus it cannot be said, as matter of law, that the use of gasoline or naphtha torches to burn off or remove old paint from building insured in order to repaint it increases the risk within the meaning of those words in the policy, where there is evidence that it is proper and customary to remove old paint in this manner, but the question is proper to be submitted to a jury;² such work or repairs may be so done, or continued or prolonged as, for instance, nearly every day for a month, as to effect such a change in the situation or circumstances affecting the risk as to make the clause or condition applicable.³ And so unauthorized alterations, not in nature of ordinary repairs, may void the policy, even though

completed before the fire, and do not contribute to or cause it.⁴

1. *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. Rep. 236, 25 Ins. L. J. 192, 30 L. R. A. 368; *Townsend v. Northwestern Ins. Co.*, 18 N. Y. 168; *Cummer Lumber Co. v. Associated Mfrs.' Ins. Co.*, 67 App. Div. 151, 73 N. Y. Supp. 668, aff'd, 173 N. Y. 633, without opinion; *Brighton Mfg. Co. v. Reading Ins. Co.*, 33 Fed. Rep. 232; and *Brighton Mfg. Co. v. Fire Assoc.*, 33 Fed. Rep. 234. And see *Washington Ins. Co. v. Davison*, 30 Md. 91.

2. *Smith v. German Ins. Co.*, *supra*.

3. *First Congregational Church v. Holyoke Ins. Co.*, 158 Mass. 475, 32 N. E. Rep. 572, 22 Ins. L. J. 449. And see *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 So. Rep. 899, 19 Ins. L. J. 45.

4. *Hill v. Middlesex Assur. Co.*, 174 Mass. 542, 55 N. E. Rep. 319.

RULE 12.

Materiality of Written Application — Violation of Specific Permission as to Use of Prohibited Articles.

In determining the question of an increase of risk, representations in an application of the insured as to certain usages and practices observed, as to mode of conducting the business, and as to precautions taken to guard against fire, are material as basis in comparison of changes whereby it is claimed the risk was increased;¹ and so when insured is permitted to use naphtha in his business, he is bound by his specific agreement in connection therewith limiting the use of fire or lights, and if he violates such agreement it causes such an increase of the risk as to void the policy.²

1. *Houghton v. Manufacturers' Ins. Co.*, 8 Met. 114 (Mass.); *Newhall v. Union Ins. Co.*, 52 Me. 180. And see *Loud v. Citizens' Ins. Co.*, 2 Gray, 221 (Mass.); *Virginia F. & M. Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. Rep. 454.

2. *Daniels v. Equitable Ins. Co.*, 50 Conn. 551.

RULE 13.

Effect of Consent to Removal to New Location.

When the policy has been transferred to cover the same property in a new location, and afterward new exposures and alterations are made, it does not prevent a forfeiture on account thereof that they conform to the form and construction of the original risk.

McCoy v. Iowa State Ins. Co., 107 Iowa, 80, 77 N. W. Rep. 529, 28 Ins. L. J. 162.

RULE 14.

As Affected by Other Clauses or Conditions in the Policy — Application of Clause Against Increase of Hazard.

There is no increase of hazard when the situation or condition claimed to operate as an increase of the risk is covered or specifically provided for by another clause or part of the policy;¹ the clause providing that if the hazard be increased within the control or knowledge of the insured the policy shall be void refers to means not specifically referred to in the policy itself, and does not modify the legal operative force of other clauses or conditions of the policy or contract of insurance.²

1. *Clinton v. Norfolk Ins. Co.*, 176 Mass. 486, 57 N. E. Rep. 998; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184. And see *North Berwick Co. v. New England F. & M. Ins. Co.*, 52 Me. 336.

2. *Thuringia Ins. Co. v. Norwaysz*, 104 Ill. App. 390.

RULE 15.

Presumption as to Assumption of Risk.

An insurance company on issuing its policy on a manufacturing or mechanical establishment is presumed to insure only against such risks as arise from

the usual and appropriate methods of carrying on the business; the introduction of a new invention, not in common use, whereby the risk is materially increased without consent of the company, voids the policy.

Washington Mut. Ins. Co. v. Merchants' Ins. Co., 5 Ohio St. 450. And see *Merchants' Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy, 181 (Ohio); *Virginia F. & M. Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. Rep. 454.

RULE 16.

Construction of "Builder's Risk."

A permit for completion of construction of a building, commonly known as a builder's risk, is construed and limited according to its terms, and any violation thereof, or an increase of the risk, such as is caused by erection of an additional building, voids the insurance, and where these facts appear by undisputed evidence it is proper for the trial court to direct a verdict in favor of the insurance company.

Franklin Brass Co. v. Phoenix Assur. Co., 65 Fed. Rep. 773, 13 C. C. A. 124, 24 Ins. L. J. 521. And see previous appeal, 58 Fed. Rep. 166, 7 C. C. A. 144.

RULE 17.

Construction Limited by Existing or Contemplated Uses or Occupation.

If policy describes a building without allusion to the kind of business to be carried on within it, and when it is issued, part of the building was being used for several different purposes, and it was manifest that the rest of it would also be thereafter occupied by other employments, the building having been built for the

purpose of being rented for different employments, apparent from inspection, and the company's agent being so informed, the provision in question may be interpreted to mean that if the hazard is increased by use of the building, or otherwise, beyond that existing or contemplated by both parties when the contract is made, the policy should become void.

Eager v. Firemen's Fund Ins. Co., 71 Hun, 352, 25 N. Y. Supp. 35, aff'd on opinion below, 148 N. Y. 726. And see *German Ins. Co. v. Hart*, 16 Ky. L. Rep. 344; *Virginia F. & M. Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. Rep. 454; *Wilson v. Union Mut. Ins. Co.*, 75 Vt. 320, 55 Atl. Rep. 662.

RULE 18.

Construction of the Words "Increase of Risk."

The words "increase of risk" are construed as meaning an essential and material increase of the risk.

Crane v. City Ins. Co., 3 Fed. Rep. 558; *Kircher v. Milwaukee Mechanics' Ins. Co.*, 74 Wis. 470, 43 N. W. Rep. 487, 19 Ins. L. J. 205.

Old forms of policy in terms provided against "any material increase of risk."

See *Allen v. Mutual Ins. Co.*, 2 Md. 111. And see *Gardiner v. Piscatquis Ins. Co.*, 38 Me. 439.

RULE 19.

As Affecting Construction of a Warranty.

The clause or condition against an increase of risk is potent in connection with the construction of a warranty as to occupation of the building insured, which, unless otherwise plainly expressed, will be construed as affirmative only, and as not intended to apply to the future condition of the property.

Blood v. Howard Ins. Co., 12 Cush. 472 (Mass.).
And see "Warranty."

RULE 20.

Question of Increase of Risk as Affected by Acts in Violation of Law.

When the sale of the subject-matter of the insurance is a mere incident of a lawful business, and the policy does not provide against the use or sale of the same, and the insurance is not effected with a purpose or to advance and encourage acts in violation of law, the validity of the policy is not affected by the fact that some illegal sales are subsequently made. There is material distinction between such a case and where the insurance is of an illegal traffic or of a business that directly and necessarily violates the law, such as policies on lotteries, or if marine insurance on unlawful voyages;¹ the illegal sale of intoxicating liquors in a dwelling does not, as matter of law, increase the risk.²

1. *Insurance Co. N. A. v. Evans*, 64 Kans. 770, 68 Pac. Rep. 623.

2. *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. Rep. 534. And see *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. Rep. 1116.

And see this volume, chapter Seventh, Title 9, "Contract as Affected by Legality."

RULE 21.

Interest of Mortgagee — Effect of Mortgagee Clause.

Under the operation of a mortgagee clause an increase of risk does not invalidate the policy in favor of the mortgagee to whom the loss is payable, unless the mortgagee is bound by its terms to notify the insurance company of such increase, in which case his failure to give the notice voids the insurance.

Cole v. Germania Ins. Co., 99 N. Y. 36, 14 Ins. L. J. 453.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Mortgagor and Mortgagee."

RULE 22.

No Application to Liens or Judgments — May be Question of Fact.

The condition against increase of risk has no application or relation to liens or judgments; it was intended to protect the property during the life of the policy from fire by change in structure, methods in heating, addition of new outbuildings on the premises, and like means within the knowledge or control of the owner whereby the hazard might be increased;¹ but whether the execution of a mortgage increases the risk or not may be a question of fact.²

1. *Collins v. London Assur. Co.*, 165 Pa. St. 298, 30 Atl. Rep. 924, 24 Ins. L. J. 658. And see *Greenlee v. North British & M. Ins. Co.*, 102 Iowa, 427, 71 N. W. Rep. 534, 26 Ins. L. J. 801.

2. *Collins v. Merchants & Bankers' Ins. Co.*, 95 Iowa, 540, 64 N. W. Rep. 602; *Crittenden v. Springfield F. & M. Ins. Co.*, 85 Iowa, 652, 52 N. W. Rep. 548, 21 Ins. L. J. 726; *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379, 44 N. W. Rep. 683.

RULE 23.

As Affected by Rate of Premium — Evidence — Test.

Upon a question or issue of an increase of risk the insurance company may show by experts as to rates of premium that the rate would be increased by the facts claimed to constitute the increase of risk, the relative rates usual for insurance under different circumstances are or may be treated as facts proper to be considered by a jury in determining the risk;¹ but while the rate of premium may be proper and competent evidence it is not conclusive, even if it is undisputed;² the test is the actual increase of danger from

fire, and not the rating established by the insurance companies.³

1. *First Congregational Church v. Holyoke Ins. Co.*, 158 Mass. 475, 32 N. E. Rep. 572, 22 Ins. L. J. 449; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; *Planters' Ins. Co. v. Rowland*, 66 Md. 236.

2. *Taylor v. Security Ins. Co.*, 88 Minn. 231, 92 N. W. Rep. 952; *Sun Mutual Ins. Co. v. Tufts*, 20 Tex. Civ. App. 147, 50 S. W. Rep. 180; *Planters' Ins. Co. v. Rowland*, *supra*.

3. *Carroll v. Home Ins. Co.*, 51 App. Div. 149, 64 N. Y. Supp. 522.

Some of the old forms of policy provided that "if the risk be increased, so as to increase the rate of insurance," and it was held that the erection of a frame carriage factory fifty feet distant from the building insured did not void the policy, it not being shown that the insured knew or ought to have known that the rate was increased.

Lebanon Mutual Ins. Co. v. Losch, 109 Pa. St. 100, 15 Ins. L. J. 104.

RULE 24.

Opinion Evidence — Experts.

Opinion evidence as to whether a risk is or is not increased by erection of a boiler-house, adjacent to building insured or proximity of new buildings is not competent;¹ testimony of a practical, experienced fireman may be received as to effect of certain alterations in a building;² underwriters are not ordinarily permitted to express their opinion as to nature of a risk, whether it is more or less hazardous;³ whether taking out and putting in fixtures, putting in new floors and stairs, having a store, increases the risk or not, is within the common knowledge of men involving no peculiar information, and opinion of experts is not admissible;⁴ witnesses are not allowed to express an opinion that leaving a house unoccupied increases the

risk;⁵ one who has charge of a certain business of manufacturing with special opportunities to know, and actual knowledge of details and processes, and liability to fire, may be competent to express an opinion as to the effect of certain changes;⁶ while not proper to receive a naked opinion that risk is increased by use of a "drier," the facts and circumstances in connection with its actual use are admissible;⁷ expert evidence may be receivable as to "burr" and "roller" process in a mill, to assist the jury in determining whether or not risk is increased by change in the machinery.⁸

1. *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Franklin Ins. Co. v. Gruver*, 100 Pa. St. 266.

2. *Schenck v. Mercer County Ins. Co.*, 4 Zab. 447 (N. J.).

3. *Merchants' Ins. Co. v. Washington Ins. Co.*, 1 Handy, 408 (Ohio). And see *German-American Ins. Co. v. Steiger*, 109 Ill. 254.

4. *Lyman v. State Ins. Co.*, 14 Allen, 329 (Mass.).

5. *Luce v. Dorchester Ins. Co.*, 105 Mass. 297. And see *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Thayer v. Providence Ins. Co.*, 70 Me. 531; *Kirby v. Phoenix Ins. Co.*, 9 Lea, 142 (Tenn.).

6. *Brink v. Merchants' Ins. Co.*, 49 Vt. 442.

7. *German-American Ins. Co. v. Steiger*, 109 Ill. 254.

8. *Planters' Ins. Co. v. Rowland*, 66 Md. 236.

RULE 25.

When Expert Testimony Admissible.

Expert testimony may be admissible upon an issue as to increase of risk when the question of the materiality of circumstances as affecting the risk arises, when its determination calls for a degree of knowledge not likely to be possessed by an ordinary jury;¹ but an insurance agent should not be permitted to give an

opinion as an expert when he has no personal knowledge of the premises, and the question to him is not based on a hypothetical question embracing the material facts appearing in the case;² if the opinion of an expert witness is admissible, it is not conclusive;³ and opinion evidence of experts is not admissible upon a matter of common knowledge or observation.⁴

1. *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. Rep. 255; *Schmidt v. Peoria Ins. Co.*, 41 Ill. 295; *Schenck v. Mercer County Ins. Co.*, 4 Zab. 447 (N. J.); *Brink v. Merchants' Ins. Co.*, 49 Vt. 442; *Planters' Ins. Co. v. Rowland*, 66 Md. 236, 16 Ins. L. J. 345. And see *Citizen Ins. Co. v. McLaughlin*, 53 Pa. St. 485.

2. *Carroll v. Home Ins. Co.*, 51 App. Div. 149, 64 N. Y. Supp. 522. And see *Stennett v. Pennsylvania Ins. Co.*, 68 Iowa, 674, 15 Ins. L. J. 536.

3. *Taylor v. Security Ins. Co.*, 88 Minn. 231, 92 N. W. Rep. 952; *Cornish v. Farms Buildings Ins. Co.*, 74 N. Y. 295.

4. *Hahn v. Guardian Assur. Co.*, 23 Oreg. 576, 32 Pac. Rep. 683; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72 (N. Y.); *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 443; *Merchants' Ins. Co. v. Washington Ins. Co.*, 1 Handy, 408 (Ohio); *Lyman v. State Ins. Co.*, 14 Allen, 329 (Mass.).

RULE 26.

When Policy not Divisible.

The policy is not divisible when the increase of risk affects the entire property or subject of the insurance, even although itemized in the policy.

Miller v. Delaware Ins. Co., Okla., 75 Pac. Rep. 1121, 65 L. R. A. 172.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 26 and note.

RULE 27.

Waiver or Estoppel.

Issue and delivery of the policy with knowledge of the company or its agent as to the facts or use of build-

ing insured operate as an estoppel preventing the company from claiming a forfeiture on account of such facts or use as an increase of the risk;¹ when, after the issue of the policy, company's agent is notified of the increase of risk, but treats the policy as continuing in force and retaining the premium or omitting to cancel same, it may operate as evidence of waiver or estoppel;² specially when the agent makes a written indorsement upon the policy consenting to the repairs which effect the change claimed to increase the risk;³ or by indorsement increases the amount at risk;⁴ and in those States where notice of an increase of risk with no action by the insurance company or oral consent of its agent may become evidence of waiver, such notice is effective when knowledge is acquired by the company's adjuster charged with the duty of supervising the repairs afterward claimed to constitute an increase of hazard.⁵

1. *Columbia Planing Mill Co. v. American Ins. Co.*, 59 Mo. App. 204; *Vesey v. Commercial Union Assur. Co.*, S. D. , 101 N. W. Rep. 1074; *Phoenix Ins. Co. v. Randle*, 81 Miss. 720, 33 So. Rep. 500.

2. *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. Rep. 339, aff'g 96 Ill. App. 525; *Fireman's Fund Ins. Co. v. Sholom*, 80 Ill. 558; *Anthony v. German-American Ins. Co.*, 48 Mo. App. 65; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Lattomus v. Farmers' Ins. Co.*, 3 Houst. 404 (Del.). So held as to an officer of the company. *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273. And see *Naughton v. Ottawa Co.*, 43 Up. Can. Q. B. 121; *Peck v. Phoenix Ins. Co.*, 45 Up. Can. Q. B. 620.

3. *Phoenix Ins. Co. v. Coomes*, Ky. , 20 S. W. Rep. 900, 22 Ins. L. J. 155.

4. *Rathbone v. City Ins. Co.*, 31 Conn. 194. And see *People's Ins. Co. v. Spencer*, 53 Pa. St. 353.

5. *Mechanics' Ins. Co. v. Hodge*, 149 Ill. 298, 37 N. E. Rep. 51, aff'g 46 Ill. App. 479. And see Rule 28.

Also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," and this volume, "Agents."

RULE 28.

**Knowledge or Notice to Company's Agent After Issue of Policy
no Waiver.**

When the form of the insurance contract or policy is prescribed by the State, and such prescribed form requires written consent to an increase of the risk, the knowledge of company's agent of an increase of risk and his failure to make objection, after issue of the policy and before the fire, cannot and do not operate as a waiver;¹ mere notice to company's agent does not waive or dispense with written consent when required by express terms of the policy.²

1. *Straker v. Phoenix Ins. Co.*, 101 Wis. 413, 77 N. W. Rep. 752, 28 Ins. L. J. 143. See Rule 27.

2. *Pottsville Ins. Co. v. Horan*, 89 Pa. St. 438, 10 Ins. L. J. 771; *Gladding v. Insurance Assoc.*, 66 Cal. 6.

See also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," and this volume, "Agents."

RULE 29.

**Effect of Demand and Receipt of Additional Premium — Insured
Has Reasonable Time to Comply with Special Condition.**

If the insurance company, knowing the facts which increase the risk, demand and receive an additional premium for such variation in the risk, it may be regarded as evidence of waiver;¹ and so acceptance of premium on renewal, with knowledge of an increase of risk, may operate as a waiver;² and so when agent agrees to continue the policy upon condition that an iron door is put in without any limitation as to time, the insured has a reasonable time to comply with such condition and if he makes all reasonable effort before the fire there is no breach of the condition.³

1. *North Berwick Co. v. New England F. & M. Ins. Co.*, 52 Me. 336.

2. *Story v. Hope Ins. Co.*, 37 La. Ann. 254, 15 Ins. L. J. 119. And see *Liddle v. Market Ins. Co.*, 29 N. Y. 184.

See also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 16, 31, 45.

3. *Viele v. Germania Ins. Co.*, 26 Iowa, 9.

RULE 30.

Pleading — Burden of Proof.

An answer or plea by the insurance company that the risk was increased, without alleging the facts or means by which it is claimed to have been increased, is objectionable, and is subject to a demurrer,¹ or motion as may be prescribed by local practice; an increase of risk is an affirmative defense which must be pleaded by the insurance company to be available;² material evidence affecting such an issue should not be excluded.³

1. *Germania Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. Rep. 286.

2. *Tischler v. California Ins. Co.*, 66 Cal. 178; *Pierce v. Cohasset Ins. Co.*, 123 Mass. 572.

3. *Traders' Ins. Co. v. Catlin*, 71 Ill. App. 569.

RULE 31.

Increase of Hazard May be Question of Law.

While ordinarily the question of increase of hazard is one of fact, proper to be submitted to and determined by a jury, there may be such a state of facts established by uncontradicted evidence as to require a court to decide it a matter of law in granting a nonsuit or in directing the verdict, as for instance, when the assured knowingly permits the storage of unslacked lime which causes the fire, it is such a manifest

increase of risk as to require a direction of the verdict in favor of the insurance company;¹ so when insured permits another person to store a large quantity of hay in a storehouse, it appearing that the hazard is thereby increased, it is not error to grant a nonsuit, and such result is not affected by the fact that hay belonging to the insured was covered by the policy;² so storage of fireworks increases the risk as matter of law;³ or other inflammable matter like gasoline;⁴ or in erection of a contiguous building specially where the fire spreads therefrom;⁵ change in occupation from that of dwelling to a hotel is one material to the risk;⁶ so placing an engine and boiler near to a corn crib insured increases the risk.⁷

1. *School District v. German Ins. Co.*, 7 S. D. 458, 64 N. W. Rep. 527, 25 Ins. L. J. 122.

2. *Alston v. Greenwich Ins. Co.*, 100 Ga. 282, 29 S. E. Rep. 266. And see *Ditmer v. Germania Ins. Co.*, 23 La. Ann. 458.

3. *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. Rep. 971.

4. *Cassimus v. Scottish Union & Nat. Ins. Co.*, 135 Ala. 256, 33 So. Rep. 163. And see *Yentzer v. Farmers' Ins. Co.*, 200 Pa. St. 325, 49 Atl. Rep. 767.

5. *Pottsville Ins. Co. v. Horan*, 89 Pa. St. 438. And see *Yentzer v. Farmers' Ins. Co.*, *supra*; *Allen v. Massasoit Ins. Co.*, 99 Mass. 160; *Washington Ins. Co. v. Davison*, 30 Md. 91.

6. *Guerin v. Manchester Assur. Co.*, 29 Can. S. C. 139.

7. *Davis v. Western Home Ins. Co.*, 81 Iowa, 496, 46 N. W. Rep. 1073, 20 Ins. L. J. 363, 10 L. R. A. 359.

RULE 32.

No Inferences in Favor of an Insurance Company.

While it may be determined, as matter of law, that there is an increase of risk when that effect is apparent or obvious from an undisputed state of facts, the courts will not indulge in any assumption or in-

ferences in favor of the insurance company; for instance, a defense of increase of risk is not sustained by proof that an addition brought the building insured a few feet nearer certain houses, there being no evidence how far distant such houses were, and whether danger of fire was thereby increased;¹ so a division of the stock between partners insured and removal of part of the goods does not, as matter of law, increase the hazard;² starting a fire in or near one of the buildings insured for the purpose of burning up some rubbish or debris, and while the assured is away from the building at noon the fire escapes or spreads so that it communicates with the insured building and destroys it, does not, as matter of law, constitute an increase of the risk or hazard voiding the insurance where there is no design to burn the building;³ so use of kerosene oil in kindling a fire in a cook-stove, although a negligent act, is not an increase of hazard in the sense of the term as used in the policy;⁴ a mortgage does not, as a matter of law, increase the hazard,⁵ nor a judgment and sale thereon;⁶ but is none the less a question of fact;⁷ vacating a house is not *per se*, as matter of law, an increase of the risk,⁸ nor is mere change in the use or occupation;⁹ there is no increase of risk in the freezing of sprinkler pipes and necessary repairs.¹⁰

1. *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 18 So. Rep. 86. And see *Mark v. National Ins. Co.*, 24 Hun, 565, *aff'd*, 91 N. Y. 663, on opinion below.

2. *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414, 68 N. W. Rep. 712, 26 Ins. L. J. 320.

3. *Des Moines Ice Co. v. Niagara Ins. Co.*, 99 Iowa, 193, 68 N. W. Rep. 600, 26 Ins. L. J. 378.

4. *Angier v. Western Assur. Co.*, 10 S. D. 82, 71 N. W. Rep. 761, 26 Ins. L. J. 795.

5. *Collins v. Merchants & Bankers' Ins. Co.*, 95 Iowa, 540, 64 N. W. Rep. 602; *Light v. Insurance Cos.*, 105 Tenn. 480, 58 S. W. Rep. 851; *Koshland v. Fire Assoc.*, 31 Oreg. 362, 49 Pac. Rep. 865, 26 Ins. L. J. 943.

6. *Lodge v. Capitol Ins. Co.*, 91 Iowa, 103, 58 N. W. Rep. 1089, 23 Ins. L. J. 735.

7. *Collins v. Merchants & Bankers' Ins. Co.*, 95 Iowa, 540, 64 N. W. Rep. 602.

8. *Boardman v. North Waterloo Ins. Co.*, 31 Ont. 525.

9. *Niagara Ins. Co. v. Johnson*, 4 Kans. App. 16, 45 Pac. Rep. 789.

10. *Cummer Lumber Co. v. Associated Mfrs. Ins. Co.*, 67 App. Div. 151, 73 N. Y. Supp. 668, aff'd, 173 N. Y. 633, without opinion.

RULE 33.

When Proper to Set Aside Verdict.

When the increase of risk is apparent, obvious, or self-evident, while it may properly be submitted to a jury as a question of fact, a verdict to the contrary should not be allowed to stand and should be set aside as contrary to law and evidence;¹ as, for instance, when a drying-house is erected six or seven feet from main building insured;² or when the fire originates in or is communicated from a newly-erected adjoining building,³ or when insured violates his agreement limiting fire and lights in connection with use of naphtha.⁴

1. *Cole v. Germania Ins. Co.*, 99 N. Y. 36, 14 Ins. L. J. 453; *Pottsville Ins. Co. v. Horan*, 89 Pa. St. 438; *Daniels v. Equitable Ins. Co.*, 50 Conn. 551. And see *Denkla v. Insurance Co.*, 6 Phila. 233 (Pa.); *Hobby v. Dana*, 17 Barb. 111; *Reid v. Gore District Ins. Co.*, 11 Up. Can. Q. B. 345.

2. *Cole v. Germania Ins. Co.*, *supra*.

3. *Pottsville Ins. Co. v. Horan*, *supra*.

4. *Daniels v. Equitable Ins. Co.*, *supra*.

RULE 34.

The Question of Increase of Hazard is Ordinarily One of Fact.

The question of increase of hazard is one of fact to be determined by a jury,¹ unless the facts be undisputed and the inferences therefrom so certain and obvious that it must be self-evident to any ordinary man that the risk was increased.² Whether conducting a gambling establishment increases the risk requires the issue as one of fact to be submitted to the jury;³ so change in use of premises from a drug store to an unlicensed drinking saloon;⁴ so introduction by insured of broommaking and storage of broom corn into building insured as a dwelling,⁵ or use of inflammable sulphur candles to fumigate a store;⁶ or substitution of a "fire drier" for a steam drier in a hominy mill,⁷ or a temporary use of a steam thrasher.⁸

1. *Taylor v. Security Ins. Co.*, 88 Minn. 231, 92 N. W. Rep. 952; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. Rep. 339, aff'g 96 Ill. App. 525; *Crete Farmers' Ins. Co. v. Miller*, 70 Ill. App. 599; *Greenwich Ins. Co. v. State*, Ark., 84 S. W. Rep. 1025; *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. Rep. 266; *Jauvrin v. Rockingham Ins. Co.*, 70 N. H. 35, 46 Atl. Rep. 686; *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368, 57 N. E. Rep. 57; *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. Rep. 78, 28 Ins. L. J. 510; *Western Assur. Co. v. Ray*, 105 Ky. 523, 49 S. W. Rep. 326, 28 Ins. L. J. 326; *North British & M. Ins. Co. v. Union Stockyard Co.*, Ky., 87 S. W. Rep. 285; *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. Rep. 236, 25 Ins. L. J. 192, 30 L. R. A. 368; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; *Hill v. Middlesex Assur. Co.*, 174 Mass. 542, 55 N. E. Rep. 319; *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. Rep. 1116, 24 Ins. L. J. 611; *Grant v. Howard Ins. Co.*, 5 Hill, 10; *Eager v. Firemen's Fund Ins. Co.*, 71 Hun, 352, 25 N. Y. Supp. 35, aff'd, 148 N. Y. 726, on opinion below; *LeRoy v. Park Ins. Co.*, 39 N. Y. 56; *Williams v. People's Ins.*

Co., 57 N. Y. 274; *Jones v. Firemen's Fund Ins. Co.*, 51 N. Y. 318; *Atherton v. British America Assur. Co.*, 91 Me. 289, 39 Atl. Rep. 1006; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535 (Mass.); *Girard F. & M. Ins. Co. v. Stephenson*, 37 Pa. St. 293; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435; *Griswold v. American Central Ins. Co.*, 70 Mo. 654; *Farmers' Ins. Co. v. Moyer*, 97 Pa. St. 441; *Franklin Ins. Co. v. Gruver*, 100 Pa. St. 266; *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553; *Lodge v. Capital Ins. Co.*, 91 Iowa, 103, 58 N. W. Rep. 1089, 23 Ins. L. J. 735; *Nicholas v. Iowa Merchants' Ins. Co.*, Iowa, , 101 N. W. Rep. 115.

2. *Taylor v. Security Ins. Co.*, 88 Minn. 231, 92 N. W. Rep. 952.

See preceding rules.

3. *Moriarty v. United States Ins. Co.*, 19 Tex. Civ. App. 669, 49 S. W. Rep. 132.

4. *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, 40 N. E. Rep. 1116, 24 Ins. L. J. 611.

5. *Anthony v. German-Amer. Ins. Co.*, 48 Mo. App. 65.

6. *Pool v. Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530, 65 N. W. Rep. 54.

7. *German-Amer. Ins. Co. v. Steiger*, 109 Ill. 254; *North B. & M. Ins. Co. v. Steiger*, 124 Ill. 81.

8. *Long v. Beeber*, 106 Pa. St. 466.

RULE 35.

What Recognized as a Fact Which May Increase the Hazard — Illustrative Cases.

Erection of a frame addition to building insured, putting in it a fireplace and stove,¹ or erection of other buildings, near to property insured, so as to increase the risk, voids the policy;² so when insurance is on barley and malt in malthouse and brewery, carrying on distilling, increases the risk;³ so change in occupation from a store to a printing office;⁴ or from a dwelling to a liquor saloon.⁵

1. *Roberts v. Chenango Ins. Co.*, 3 Hill, 501 (N. Y.).

2. *Murdock v. Chenango Ins. Co.*, 2 N. Y. 210. Specially when cause of the loss. See *Howard v. Kentucky & Louisville Ins. Co.*, 13 B. Monr. 282 (Ky.).

3. *People's Ins. Co. v. Spencer*, 53 Pa. St. 353.

4. *Hervey v. Mutual Ins. Co.*, 11 Up. Can. C. P. 394.

5. *Lappin v. Charter Oak Ins. Co.*, 58 Barb. 325; *Western Assur. Co. v. McPike*, 62 Miss. 740.

As to effect of change from dwelling to a disorderly house of prostitution, see *Indiana Ins. Co. v. Brehm*, 88 Ind. 578, 12 Ins. L. J. 607.

RULE 36.

What is not an Increase of Hazard — Illustrative Cases.

Neglect to repair steam chest of a pump is not an increase of the risk;¹ nor is commencement of foreclosure proceedings as against the mortgagee holding policy with mortgagee clause;² nor killing of a horse, in an adjoining field, by lightning;³ a building twenty-five feet distant is not contiguous;⁴ it will not be assumed, as a fact, that a change in the machinery of a flour mill from the burr process to the roller process increases the risk;⁵ removal of goods insured from the first floor to the basement does not increase the risk;⁶ and so an addition or extension to building insured does not necessarily create an increase of risk.⁷ The mere change of occupants does not increase the risk;⁸ nor does the process of reducing liquor by the mixing of water and the making of cocktails, as matter of law, increase the risk of an insurance upon a stock of groceries;⁹ nor is lighting a building with gasoline necessarily construed as using the building for a more hazardous business;¹⁰ nor is the mere vacation of a house by the insured or occupants or change of tenants a change material to the risk;¹¹ though vacancy may amount to an increase of the risk,¹² and vacancy creates a presumption of increase of risk under the Maine statute;¹³ the placing and use of a steam thresher near

barn insured is not an increase of risk when in temporary use in course of insured's business.¹⁴

1. *Albion Lead Works v. Williamsburg City Ins. Co.*, 2 Fed. Rep. 479, 9 Ins. L. J. 435.

2. *Phoenix Ins. Co. v. Union Mutual Ins. Co.*, 101 Ind. 392, 14 Ins. L. J. 461.

3. *Haws v. Philadelphia Fire Assoc.*, 114 Pa. St. 431.

4. *Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432.

5. *Planters' Ins. Co. v. Rowland*, 66 Md. 236.

6. *Plinsky v. Germania Ins. Co.*, 32 Fed. Rep. 47.

7. *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000, 6 So. Rep. 899.

8. *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352 (Tenn.).

9. *Bayly v. London & Lancashire Ins. Co.*, 4 Ins. L. J. 503 (U. S. Cir.).

10. *Mutual Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. St. 407.

11. *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88 (Va.). And see *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; *Game-well v. Merchants' Ins. Co.*, 12 Cush. 167 (Mass.); *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553; *Gilliat v. Pawtucket Ins. Co.*, 8 R. I. 282; *Miller v. Oswego Ins. Co.*, 18 Hun, 525 (N. Y.); *Somerset County Ins. Co. v. Usaw*, 112 Pa. St. 80.

12. *Lancy v. Home Ins. Co.*, 82 Me. 492, 20 Atl. Rep. 79, 19 Ins. L. J. 878.

13. *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. Rep. 167, 20 Ins. L. J. 900.

14. *German Ins. Co. v. Hart*, 16 Ky. L. Rep. 344.

See Rules 33, 34.

In *Luce v. Dorchester Ins. Co.*, 110 Mass. 361, where policy provided it should be void if any increase of risk, the trial court refused to instruct the jury "that if under this policy plaintiff might have recovered even for the consequences of the acts of vicious or bad tenants, yet he cannot recover if the building was wholly unoccupied for so long a time as to render the risk greater than it would have been with tenants of ordinary care and habits," and on appeal such refusal was held to be error, and that the insurance company was entitled to the charge as requested.

TITLE III.**Alterations or Repairs by Mechanics.**

- RULE**
1. As imposed by contract.
 2. If condition violated policy rendered void without regard to any question of increase of risk.
 3. Test of time substituted for former test of reasonableness — Change commendable.
 4. Permission limited to property described — Admission of parol evidence — Construction of addition.
 5. Effect of permission for repairs and alterations.
 6. Limitation of special permission for alterations and repairs.
 7. Permission applicable to building in course of erection.
 8. Effect of carpenter's risk only.
 9. Risk must not be increased further than necessary.
 10. As affected by construction.
 11. Repairs not extended by construction.
 12. Construction of the word "mechanics."
 13. Application of permission or condition to tenants.
 14. When policy contains no condition as to repairs — Question of fact — Effect of special permission.
 15. Suspension of policy when hazard increased.
 16. Removal of automatic sprinkler equipment.
 17. Assignee of policy not affected by subsequent acts of grantor.
 18. Effect of condition against alteration by specific means.
 19. Expert evidence.
 20. Waiver or estoppel when policy issues.
 21. Oral agreement by agent to grant a permit ineffectual.

RULE I.**As Imposed by Contract.**

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if mechanics be employed in building, altering, or repairing the within-described premises for more than fifteen days at any one time.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island,
New Jersey,	Wisconsin.

The standard form of policy prescribed in Michigan is the same, except there is added: "Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss."

The standard form of policy prescribed in

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain above provision.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

Many of the old forms contained a specific provision declaring that "the working of carpenters, roofers, gasfitters, plumbers, and other mechanics, in building, altering, or repairing any building or buildings covered, will cause a forfeiture of all claim under this policy, without the written consent of the company indorsed hereon," and it was held that the altering by carpenters of a grocery store into a building for drying fruit was so manifestly a violation of the condition that it was proper for the trial court to direct a verdict in favor of the insurance company.

Mack v. Rochester German Ins. Co., 106 N. Y. 560, 13 N. E. Rep. 343.

And under same or similar condition it was held that the clause did not apply to casual ordinary necessary repairs.

Franklin Ins. Co. v. Chicago Ice Co., 36 Md. 102; *James v. Lycoming Ins. Co.*, 4 Cliff. 272 (U. S. Cir.).

Specially as applied to a dwelling, when by a clause in addition five days were allowed for incidental repairs without notice or indorsement, and the repairs in question had been in progress less than the five days allowed.

Rann v. Home Ins. Co., 59 N. Y. 387.

* See note to "Concealment," Rule 1, page 2.

And so, under same or similar condition, a carpenter who had been instructed to make certain alterations had gone upon the premises the day before the fire and removed two small pieces of stair rail, it was held that there was no violation of the condition.

Summerfield *v.* Phoenix Ins. Co., 65 Fed. Rep. 292.

RULE 2.

If Condition Violated Policy Rendered Void Without Regard to Any Question of Increase of Risk.

If mechanics are employed in building, altering, or repairing the premises described in the policy for more than the specified time, or in violation of the condition, without written consent indorsed, it renders the policy void, according to its terms, without any regard to increase of hazard, which question is not necessarily involved, though fire may have occurred while the work was in progress;¹ if there is a breach of the condition it voids the policy without reference to any question of increase of risk; the two conditions are independent of each other.²

1. Newport Improvement Co. *v.* Home Ins. Co., 163 N. Y. 237, 57 N. E. Rep. 475.

2. Imperial Ins. Co. *v.* Coos County, 151 U. S. 452, 23 Ins. L. J. 282.

RULE 3.

Test of Time Substituted for Former Test of Reasonableness — Change Commendable.

The time limit applied and imposed by the condition (Rule 1), is operative in all cases, without regard to reasonableness or character of the repairs. The test of time is substituted for the former test of reasonableness, and the change in the language of the con-

dition is commendable and worthy of support by the courts.

German Ins. Co. v. Hearne, 117 Fed. Rep. 289, 54 C. C. A. 527.

RULE 4.

Permission Limited to Property Described — Admission of Parol Evidence — Construction of Addition.

A permission for "additions, alterations, and repairs" is limited in its application to the property certainly described in the policy, and cannot be extended by construction or admission of parol evidence, to a separate building not included in or covered by the description;¹ a building forty feet distant from the insured building, although connected by a bridge and an underground passage, cannot be called an "addition" covered by an indorsement permitting "additions, alterations, and repairs."² When the description in the policy may be construed as covering or extending to an entire plant, the word "additions" refers to additions to the plant and may include new buildings constructed thereon.³

1. *Arlington Mfg. Co. v. Norwich Union Ins. Co.*, 107 Fed. Rep. 662, 46 C. C. A. 542.

2. *Peoria Sugar Refining Co. v. People's Ins. Co.*, 24 Fed. Rep. 773, 15 Ins. L. J. 52. And see 52 Conn. 581.

3. *Arlington Co. v. Colonial Assur. Co.*, 180 N. Y. 337, 73 N. E. Rep. 34.

RULE 5.

Effect of Permission for Repairs and Alterations.

When the policy permits repairs and alterations whatever is necessary or usual to be done in the proper performance of the work may be done without voiding

the insurance under other clauses or conditions; for instance, if it is necessary to stop or suspend the operation of a factory to make the repairs, the policy cannot be claimed to be void under the clause declaring it void, if the factory should cease to be operated;¹ so a clause forbidding the use of open lights is not violated by the use of a torch necessary for the completion of permitted repairs.² Any increase of risk incident to the making of reasonable and necessary repairs is part of the general risk assumed by the insurance company, and hence the clause or condition against an increase of hazard is inoperative.³

1. *American Ins. Co. v. Brighton Cotton Mfg. Co.*, 24 Ill. App. 149, aff'd, 125 Ill. 131, 17 N. E. Rep. 771.

2. *Au Sable Lumber Co. v. Detroit Ins. Co.*, 89 Mich. 407, 50 N. W. Rep. 870, 21 Ins. L. J. 311.

3. *Townsend v. Northwestern Ins. Co.*, 18 N. Y. 168. And see *Washington Ins. Co. v. Davison*, 30 Md. 91.

RULE 6.

Limitation of Special Permission for Alterations and Repairs.

When the insurance company, by special clause or indorsement, gives permission for "necessary alterations and repairs" such consent does not necessarily operate to authorize a material enlargement of the building insured; and if additions and enlargements are in terms specifically prohibited by the policy, such enlargement or addition voids the insurance without regard to whether the risk be increased or not.

Frost Works v. Millers & Manufacturers' Ins. Co., 37 Minn. 300, 34 N. W. Rep. 35.

RULE 7.

Permission Applicable to Building in Course of Erection.

If the insurance company having a policy on a building in course of erection gives or indorses a consent "thirty days granted to complete construction and occupy as dwelling," such permission supersedes the printed condition allowing fifteen days for building, altering, or repairing, and the limit of thirty days so prescribed cannot be extended by tacking on to it the fifteen days.

Burnham v. Royal Ins. Co., 75 Mo. App. 394, 27 Ins. L. J. 928.

RULE 8.

Effect of "Carpenter's Risk Only."

When the insurance company, by a special clause or indorsement, inserts "carpenter's risk only," it does not necessarily limit the insurance to completion of the repairs.

Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 11 Ins. L. J. 125.

RULE 9.

Risk Must not be Increased Further Than Necessary.

If the insurance company gives permission to make alterations, additions, and repairs, such consent cannot be limited to such as do not increase the risk. The reasonable construction is that insured cannot increase the risk further than necessary in availing himself of such permission.

Firemen's Ins. Co. v. Appleton Paper Co., 161 Ill. 9, 43 N. E. Rep. 713, 25 Ins. L. J. 634, *aff'd* 59 Ill. App. 511.

RULE 10.**As Affected by Construction.**

In the construction or interpretation of clauses or conditions relating to repairs, alterations, and the work of carpenters and mechanics, the insurance company has the right to insist upon their due observance, and to the benefit of every restriction and limitation upon liability provided for, but care should be taken that a strained and unnatural effect should not be given to words and terms to the prejudice of the insured, and in no case should they be extended by implication, so as to embrace cases not clearly or reasonably within the very words of the condition, as such words are ordinarily used and understood.

Rann v. Home Ins. Co., 59 N. Y. 387.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 17.

RULE 11.**Repairs not Extended by Construction.**

The word "repairs" will not be extended by construction to apply and cover a substantial or material addition; as, for instance, the putting in a new cotton gin, press, and mule power, will not be considered repairs to the ginhouse.

Noyes v. Hartford Ins. Co., 54 N. Y. 668, 3 Ins. L. J. 44.

RULE 12.**Construction of the Word "Mechanics."**

The word "mechanics" is not construed to mean any and every person who may do some work on the

building; for instance, painters are not "mechanics" within the meaning of that word as employed in the policy.

Smith v. German Ins. Co., 107 Mich. 270, 65 N. W. Rep. 236, 25 Ins. L. J. 192, 30 L. R. A. 368.

RULE 13.

Application of Permission or Condition to Tenants.

A clause or condition in the policy providing that mechanics will be allowed to make ordinary alterations and repairs to building not exceeding fifteen days, as against one of several tenants insured, may be construed to apply only to buildings under control of the insured;¹ but ordinarily possession of a tenant is the possession of the landlord, and a condition against alteration is violated by an alteration by the tenant, though without the authority or knowledge of the landlord insured.²

1. *Mechanics' Ins. Co. v. Hodge*, 149 Ill. 298, 37 N. E. Rep. 51, aff'g 46 Ill. App. 479.

2. *Diehl v. Adams County Ins. Co.*, 58 Pa. St. 443.

When knowledge is an essential element it must be shown that it extended to character of the improvement or changes.

Merrill v. Insurance Co. N. A., 23 Fed. Rep. 245, 14 Ins. L. J. 457.

And see "Increase of Hazard."

RULE 14.

When Policy Contains no Condition as to Repairs — Question of Fact — Effect of Special Permission.

If the policy contains no provision or condition in regard to repairs, the insured may make all such repairs as may be usual and necessary in ordinary

acts of ownership without affecting the insurance, but when such repairs extend beyond such limitation, materially increasing the risk, then the policy may be voided; the question is to be determined by a jury, and not by the court;¹ and when the insurance company gives specific permission to make alterations and repairs incidental to the business, the rule is substantially the same.²

1. *Jolly v. Baltimore Society*, 1 Harr. & G. 295 (Md.). And see *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535 (Mass.); *Stetson v. Massachusetts Ins. Co.*, 4 Mass. 330; *Jones Mfg. Co. v. Manufacturers' Ins. Co.*, 8 Cush. 82 (Mass.); *Young v. Washington County Ins. Co.*, 14 Barb. 545 (N. Y.); *Dorn v. Germania Ins. Co.*, 5 Ins. L. J. 183 (U. S. Cir.).

2. *Crane v. City Ins. Co.*, 3 Fed. Rep. 558.

RULE 15.

Suspension of Policy When Hazard Increased.

When the question of increase of hazard is connected with the repairs the effect is to suspend the policy only during such increase.

Insurance Co. N. A. v. McDowell, 50 Ill. 120.

See also this volume, chapter "Increase of Hazard."

RULE 16.

Removal of Automatic Sprinkler Equipment.

Removal of an automatic sprinkler equipment in order to replace it with a better system, does not void the policy, when permission is given to make alterations and repairs, and when the presence of the sprinkler is not made a condition of the risk.

Firemen's Ins. Co. v. Appleton Paper Co., 161 Ill. 9, 43 N. E. Rep. 713, 25 Ins. L. J. 634, aff'g 59 Ill. App. 511.

RULE 17.

Assignee of Policy not Affected by Subsequent Acts of Grantor.

An assignee of the policy, with the consent of the company, is not affected by the subsequent unauthorized act of his grantor in causing repairs to be made.

Breckinridge v. American Central Ins. Co., 87 Mo. 62.

RULE 18.

Effect of Condition Against Alteration by Specific Means.

When policy in terms provides against alterations by specific means, such as in introduction of steam or a steam engine, violation of the condition voids the policy without regard to whether the engine introduced is used merely as an experiment, or as a mode of carrying on the business, or whether used for a longer or shorter time.

Glen v. Lewis, 8 Wels., Hurls. & Gord. 607 (Eng.).

RULE 19.

Expert Evidence.

When the question of an increase of hazard is relevant to or connected with that raised by alterations and additions, a properly qualified and experienced insurance officer or agent may give his opinion as an expert as to the effect of such alterations and additions upon the risk and rate.

Kern v. South St. Louis Ins. Co., 40 Mo. 19.
And see "Increase of Hazard."

RULE 20.

Waiver or Estoppel When Policy Issues.

Issue and delivery of the policy with knowledge by the company or its agent of existing facts in violation of the condition operates as a waiver or estoppel, preventing the company from claiming a forfeiture by reason of such facts.

Hackett v. Philadelphia Underwriters, 79 Mo. App. 16.

And see and compare the various rules governing waiver, Vol. 1, *Fire Insurance as a Valid Contract*, chapter 10, "Waiver."

RULE 21.

Oral Agreement by Agent to Grant a Permit Ineffectual.

An agent with authority to grant permits for vacancies and also for repairs by attaching written or printed permits to policies and sending copies of same to the company does not have authority to bind the company by an oral agreement to grant a permit. Even if the agent says, "when the mechanics begin work we will put on (the policy) a mechanic's permit," it implies that notice must be given before the permit should be attached, and cannot be construed as a present permit or agreement for a future permit without notice. The fact that the agent is also agent of the insured in respect to caring for the property and has possession of the policy is immaterial. A permission to be unoccupied cannot be construed to include a permit for repairs, so as to prevent effect of the latter as an increase of the risk without permission.

Hill v. Commercial Union Assur. Co., 164 Mass. 406, 41 N. E. Rep. 657, 25 Ins. L. J. 185.

Mere knowledge of an agent after issue of the policy is inoperative as evidence of waiver or estoppel against the insurance company.

Sykes v. Perry County Ins. Co., 34 Pa. St. 79; *Robinson v. Mercer County Ins. Co.*, 3 Dutch. 134 (N. J.).

And see Vol. 1, *Fire Insurance as a Valid Contract*, the various rules governing "Waiver," chapter 10. Also this volume, "Agents."

Under the old forms repairs and alterations did not have the effect to void the insurance unless the risk was increased.

See Rules 1, 2, 3, and cases thereunder, and *Kern v. South St. Louis Ins. Co.*, 40 Mo. 19.

Some contained specific provisions that alterations should not affect the insurance unless the risk was increased.

Merriam v. Middlesex Ins. Co., 21 Pick. 162 (Mass.). And see *Girard Ins. Co. v. Stephenson*, 37 Pa. St. 293; *Lyman v. State Ins. Co.*, 14 Allen, 329 (Mass.); *Troy Ins. Co. v. Carpenter*, 4 Wis. 20; *Sykes v. Perry County Ins. Co.*, 34 Pa. St. 79; *Ottawa Forwarding Co. v. Liverpool, L. & G. Ins. Co.*, 28 Up. Can. Q. B. 518.

But this did not mean that alterations should be of a permanent character, nor that they should cause the fire, to void the policy.

Lyman v. State Ins. Co., *supra*.

Other forms provided that the company should not be liable for a loss caused by material repairs when made without consent.

Howell v. Baltimore Soc., 16 Md. 377; *Troy Ins. Co. v. Carpenter*, 4 Wis. 20.

And others contained specific provision requiring notice of erection or alteration of any building.

Calvert v. Hamilton Ins. Co., 1 Allen, 308 (Mass.).

TITLE IV.

ILLUMINATING GAS OR VAPOR AND PROHIBITED ARTICLES.

- RULE**
1. As imposed by contract.
 2. Construction — Violation voids policy without regard to increase of risk or cause of fire.
 3. Ignorance no excuse.
 4. Construction of the word "premises."

- RULE** 5. Construction of the words "kept and used on premises."
6. Construction of word "allowed."
7. Construction of parenthetical words in Rule 1 applicable to kerosene.
8. Construction of the words "for lights and by daylight."
9. Reduced oil residuum of petroleum — Increase of hazard — Question of fact.
10. Every occupation is not trade or manufacture — Usage and custom.
11. Judicial notice — Effect of use of general words.
12. Construction of special permission or privilege.
13. Special permit limited in time by its terms.
14. Ordinary repairs.
15. Use of gasoline without permission.
16. Keeping in barn does not prevent forfeiture for use in dwelling.
17. Keeping of gasoline not excused by abandonment of specific purpose.
18. Rate of premium conveys no notice.
19. Custom in use of gasoline for exhibition purposes.
20. Contract ends when condition violated — Not revived without consent of the insurance company.
21. Occasional or temporary necessary use — Repairs — Household purposes — Cleaning machinery.
22. Limitation of preceding rule.
23. Written description construed as agreement providing otherwise.
24. Effect of written description — Evidence — Risk of particular business.
25. Limitation of rule as to assumption of risk of particular business.
26. A sale incidental to a business does not permit manufacture.
27. Drawing of kerosene.
28. Keeping of gunpowder.
29. Effect of permission to be occupied for hazardous or extrahazardous purposes.
30. Usage or custom — Ambiguity in description.
31. Opinion evidence — Experts.
32. Keeping or use by tenant.
33. Waiver or estoppel when policy issues — After issue.
34. Waiver as to use of small quantity not extended.

RULE 35. Burden of proof.

36. Article may not be prohibited yet violate condition as to increase of hazard — Question of fact.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorous, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights, and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light).

This rule is imposed by above terms by the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island.

The standard form of policy prescribed in Michigan is the same, except there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.”

* See note to “Concealment,” Rule 1, page 2.

The standard form of policy prescribed in Wisconsin is the same, except that "Wisconsin" is substituted for "United States" in the clause prescribing standard of kerosene oil.

The standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	

provides: "This policy shall be void, if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law, or if camphene, benzine, naphtha, or other chemical oils or burning fluids, shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil, may be used for lighting, and in dwelling-houses kerosene oil-stoves may be used for domestic purposes — to be filled when cold, by daylight, and with oil of lawful fire test only."

The standard form of policy prescribed in New Hampshire provides:

"This policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: * * * if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law; or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting." It is furthermore provided by statute made part of the policy: "A change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, shall not affect the policy except while the change or breach continues."

The standard form of policy prescribed in South Dakota provides:

"This policy shall be void if without the assent of the insurer, illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein, or if without the assent of the insurer there be kept on the above-described premises dynamite, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, or petroleum or any of its products of greater inflammability than gasoline or kerosene oil of lawful fire test (which gasoline and kerosene may be kept and used for lights and usual do-

mestic purposes), and kerosene may be kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lights filled by daylight, or at a distance not less than ten feet from artificial light."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

RULE 2.

Construction — Violation Voids Policy Without Regard to Increase of Risk or Cause of Fire.

The language of the policy must be construed to mean what it says, and when the keeping of gasoline is in violation of its terms or of the terms of a special permit for its use, it is sufficient ground of forfeiture without regard to results, or any question as to increase of risk, and without reference to the cause or origin of the fire;¹ and so the insured voids his insurance by placing in his house a lot of fireworks, especially when they cause the damage for which claim is made;² and so the insurance is voided by having gunpowder over the prescribed quantity.³

1. *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. Rep. 551, aff'g 104 Ill. App. 390; *Kennefick-Hammond Co. v. Norwich Union Fire Assoc.*, Mo. App. , 80 S. W. Rep. 694; *Turnbull v. Home Ins. Co.*, 83 Md. 312, 34 Atl. Rep. 875; *Bastian v. British American Assur. Co.*, 143 Cal. 287, 77 Pac. Rep. 63, 66 L. R. A. 255. And see *Cassimus v. Scottish Union & Nat. Ins. Co.*, 135 Ala. 256, 33 So. Rep. 163; *Boyer v. Grand Rapids Ins. Co.*, 124 Mich. 455, 83 N. W. Rep. 124, *Hutton v. Patrons Mutual Ins. Co.*, 191 Pa. St. 369, 43 Atl. Rep. 219; *Pennsylvania Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. Rep. 55; *Fischer v. London & Lancashire Ins. Co.*, 83 Fed. Rep. 807, 27 Ins. L. J. 417; *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530.

2. *Heron v. Phoenix Ins. Co.*, 180 Pa. St. 257, 36 Atl. Rep. 740, 26 Ins. L. J. 690.

3. *Faulkner v. Central Ins. Co.*, 1 Kerr, 279 (N. B.).

RULE 3.

Ignorance no Excuse.

The insured cannot escape the legal consequence of a violation of a condition as to prohibited articles by a plea of ignorance;¹ if their use is habitual the law imputes to the insured knowledge and permission.²

1. *Reeve v. Phoenix Ins. Co.*, 23 La. Ann. 219; *Kohlmann v. Selvage*, 34 App. Div. 380, 54 N. Y. Supp. 230.

And see Rule 2, also Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 5.

2. *Farmers & Mechanics' Ins. Co. v. Simmons*, 30 Pa. St. 299.

RULE 4.

Construction of the Word "Premises."

The word "premises" is construed to mean only those buildings which are described or mentioned in the written description or part of the policy, and does not extend to and include the lot outside upon which none of the buildings stand; hence benzine may be kept in an open shed on the same lot, eight or ten feet from the building described and in no way connected with any of them;¹ and so gasoline may be stored on lot outside of the building in reasonable quantities;² or fireworks may be kept in another building upon the same lot.³ But rule may be otherwise when the buildings are connected by a pipe through which the prohibited article flows.⁴

1. *Rau v. Westchester Ins. Co.*, 36 App. Div. 179, 55 N. Y. Supp. 459, 28 Ins. L. J. 182; subsequent appeal, 50 App. Div. 428, aff'd, 168 N. Y. 665, without opinion; *Firemen's Fund Ins. Co. v. Shearman*, 20 Tex. Civ. App. 343, 50 S. W. Rep. 598. And see *Kohlmann v. Selvage*, 34 App. Div. 380, 54 N. Y. Supp. 230; *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; *Sperry v. Insurance Co. N. A.*, 22 Fed. Rep. 516, 14 Ins. L. J. 141.

2. *Northwestern Life Ins. Co. v. Germania Ins. Co.*, 40 Wis. 446; *LaForcé v. Williamsburg City Ins. Co.*, 43 Mo. App. 518.

3. *Allemania Ins. Co. v. Pittsburg Exposition Soc.*, Pa. St. , 11 Atl. Rep. 572.

4. *White v. Western Assur. Co.*, Pa. St. , 16 Ins. L. J. 233.

RULE 5.

Construction of the Words "Kept" and "Used on Premises."

The word "kept," in a policy, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time; naphtha is used "on the premises," although actually used outside to burn off old paint.

First Congregational Church v. Holyoke Ins. Co., 158 Mass. 475, 32 N. E. Rep. 572, 22 Ins. L. J. 449.

Under old forms the word "kept" was construed as meaning keeping as objects of merchandise or manufacture.

Putnam v. Commonwealth Ins. Co., 18 Blatchf. 368 (U. S. Cir.).

RULE 6.

Construction of Word "Allowed."

The word "allowed" is to be construed as meaning in the clause or condition "allowed to be kept or used," and as so construed does not apply when the insured permitted gasoline to be carried through the building or store, without leaving or depositing it there.

London & Lancashire Ins. Co. v. Fischer, 92 Fed. Rep. 500, 34 C. C. A. 503, 28 Ins. L. J. 452. And see *Springfield F. & M. Ins. Co. v. Wade*, Tex. , 68 S. W. Rep. 977.

RULE 7.

Construction of Parenthetical Words in Rule 1 Applicable to Kerosene.

The words in parenthesis made applicable to kerosene oil ("which last may be used for lights only, pro-

vided the oil be drawn and the lamps trimmed and filled solely by daylight,'') import a regulation of the use of kerosene oil used for lighting purposes, and the condition will not be construed to prohibit its use for any other purpose than for lights; a policy is not avoided by the mere use of kerosene in a lamp as part of an oil stove used for cooking, the oil being of the prescribed standard;¹ but drawing kerosene by lamp-light whereby loss is caused, voids the insurance.²

1. *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 544, 37 Atl. Rep. 1022, 26 Ins. L. J. 905, rev'g 59 N. J. L. 18, 25 Ins. L. J. 715, 34 Atl. Rep. 931.

2. *Gunther v. Liverpool, L. & G. Ins. Co.*, 134 U. S. 110, 19 Ins. L. J. 417, aff'g 34 Fed. Rep. 501. And see previous appeal, 116 U. S. 113, 15 Ins. L. J. 161, rev'g 20 Blatchf. 362.

RULE 8.

Construction of the Words "For Lights" and "By Daylight."

The words "for lights" are restricted in their meaning to lighting the insured premises only, and the words "by daylight" are intended to prevent the use of artificial light from which the oil might catch fire.

Gunther v. Liverpool, L. & G. Ins. Co., 134 U. S. 110, 10 Sup. Ct. Rep. 448, 19 Ins. L. J. 417, aff'g 34 Fed. Rep. 501. And see previous appeal, 116 U. S. 113, 15 Ins. L. J. 161, rev'g 20 Blatchf. 362.

RULE 9.

Reduced Oil, Residuum of Petroleum, Increase of Hazard — Question of Fact.

The standard form of policy does not prohibit the use of reduced oil, a residuum of petroleum, as a fuel under boilers. The only question is whether the use and manner of use increases the hazard, and this is a

question of fact proper to be submitted to a jury, whose determination is conclusive.

Grand Rapids Hydraulic Co. v. American Ins. Co., 93 Mich. 396, 53 N. W. Rep. 538, 22 Ins. L. J. 158.

(In this case experts testified that the reduced oil in question was safer than kerosene oil, Michigan State standard, and that it was less inflammable than crude petroleum, and less so than kerosene.)

RULE 10.

Every Occupation is not Trade or Manufacture — Usage and Custom.

It is not every occupation that is a trade or manufacture within meaning of the policy; for instance, operating a laundry is not such a trade or manufacture as to require the exclusion of evidence of usage or custom in use of gasoline.

Northern Assur. Co. v. Crawford, 24 Tex. Civ. App. 574, 59 S. W. Rep. 916.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 23.

RULE 11.

Judicial Notice — Effect of Use of General Words.

The courts will not take judicial notice that a certain article claimed to be an explosive is such in fact; same must be proved as matter of fact, and cannot be assumed as matter of law;¹ and same rule applies when language used is "any other inflammable"² or "burning fluid;"³ or "coal or earth oil;"⁴ and when such general words are used, they are construed in connection with the context, and if specific articles are there prohibited, the proof must be that the article in question is of the same nature.⁵

1. *Willis v. Germania Ins. Co.*, 79 N. C. 285; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421.

2. *Wood v. Northwestern Ins. Co., supra*; *Moseley v. Vermont Ins. Co.*, 55 Vt. 142, 13 Ins. L. J. 97.

3. *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368; *Wheeler v. American Central Ins. Co.*, 6 Mo. App. 235; *Mark v. National Ins. Co.*, 24 Hun, 565, aff'd, 91 N. Y. 663, on opinion below.

4. *Bennett v. North British & M. Ins. Co.*, 8 Daly, 471, aff'd, 81 N. Y. 273.

5. *Mears v. Humboldt Ins. Co., supra*; *Wheeler v. American Central Ins. Co., supra*. And see *Morse v. Buffalo Ins. Co.*, 30 Wis. 534.

RULE 12.

Construction of Special Permission or Privilege.

A permission or privilege indorsed or inserted for the keeping or use of prohibited articles, is not construed as a warranty unless the language is in terms explicit requiring such construction; hence such a permission is to be substantially rather than literally and exactly complied with, having reasonable reference to enjoyment of its benefits.

Maryland Ins. Co. v. Whiteford, 31 Md. 219.

(In this case the permission was "permission given to keep one barrel of benzine in tin cans," and the benzine was brought in a barrel and transferred by syphon into a single can, and it was held that procuring it by the barrel was a substantial compliance, and then transferring it was allowable by every fair intendment, and was not a keeping it therein.)

See this volume, "Warranty."

RULE 13.

A Special Permit Limited in Time by Its Terms.

A permit for storing or keeping for a certain prescribed period of time does not operate as an implied permission for continuance after its expiration; if not renewed, policy becomes void, even though company's agent may know of the continuance.

Betcher v. Capital Ins. Co., 78 Minn. 240, 80 N. W. Rep. 971.

RULE 14.

Ordinary Repairs.

The condition against prohibited articles does not apply if their use be reasonably safe and proper in making ordinary repairs. If naphtha has been used to burn off old paint, the question for the jury is whether the company, familiar with the condition of the building and the methods usually adopted in making repairs, should have contemplated when policy was issued that the insured would burn off the paint at such a time and in such a way as he did? Was such a use of naphtha a reasonably safe and proper way of making repairs under the circumstances?¹ And so the keeping of a five-gallon can of gasoline in the building for several weeks from which to supply torches used in removing old paint from the outside of the building preparatory to repainting it, does not, as matter of law, constitute a violation of the condition.²

1. First Congregational Church *v.* Holyoke Ins. Co., 158 Mass. 475, 32 N. E. Rep. 572, 22 Ins. L. J. 449. And see Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. Rep. 236, 25 Ins. L. J. 192, 30 L. R. A. 368.

2. Smith *v.* German Ins. Co., *supra*.

RULE 15.

Use of Gasoline Without Permission.

When gasoline is brought upon the premises for purpose of using it in a gasoline stove, without permission of the company, it voids the policy, the loss occurring during a breach of the condition, and while the terms of the contract are being violated.

Boyer *v.* Grand Rapids Ins. Co., 124 Mich. 455, 83 N. W. Rep. 124. And see Fischer *v.* London & Lancashire Ins. Co., 83

Fed. Rep. 807, 27 Ins. L. J. 417; *McFarland v. St. Paul F. & M. Ins. Co.*, 46 Minn. 519, 49 N. W. Rep. 253.

See Rule 1, Michigan standard form.

RULE 16.

Keeping in Barn Does not Prevent Forfeiture for Use in Dwelling.

When there is no evidence of permission being given to use gasoline, the fact that the vessel in which it is kept is stored in a barn does not relieve the insured of a forfeiture, brought about by the use of the gasoline in a residence containing household and kitchen furniture insured.

Pennsylvania Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. Rep. 55.

RULE 17.

Keeping of Gasoline not Excused by Abandonment of Specific Purpose.

A permission or privilege to use a gas machine or apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, does not protect the insured in keeping or storing gasoline not intended for use in such apparatus.

Liverpool, L. & G. Ins. Co. v. Gunther, 116 U. S. 113, 15 Ins. L. J. 161, rev'g 20 Blatchf. 362.

RULE 18.

Rate of Premium Conveys no Notice.

The rate of premium does not convey notice to the insurance company that gasoline is to be used or kept.

Turnbull v. Home Ins. Co., 83 Md. 312, 34 Atl. Rep. 875.

RULE 19.

Custom in Use of Gasoline for Exhibition Purposes.

The custom of the insured and other dealers in use of gasoline in a business (such as stove and tinware) not necessarily connected with it, but simply for exhibition or explanatory purposes in selling stoves, will not prevent a forfeiture of the insurance.

Fischer v. London & Lancashire Ins. Co., 83 Fed. Rep. 807, 27 Ins. L. J. 417.

RULE 20.

Contract Ends When Condition Violated—Not Revived Without Consent of Insurance Company.

The contract of insurance ends the moment the condition as to prohibited articles is legally violated, without regard to time or cause of fire, and cannot be revived again without consent, unless the insurance company, by some act or line of conduct, waives the breach. The reason of this rule is, that to hold otherwise would be to substitute the pleasure of the insured for the legal obligations of the contract, as he could violate the condition, subject the insurance company to increase of the risk, and revive the contract at will.

Mead v. Northwestern Ins. Co., 7 N. Y. 530.

See and compare Rule 21 *et seq.* ; and also this volume, "Increase of Hazard."

Old forms in express terms provided for suspension of the policy while prohibited articles were used.

Hynds v. Schenectady Ins. Co., 11 N. Y. 554; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368 (U. S. Cir.); *Maryland Ins. Co. v. Whiteford*, 31 Md. 219, 228; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. 9 (Ky.).

And see "Increase of Hazard," Rules 5, 7, 9, and notes.

RULE 21.

Occasional or Temporary Necessary Use — Repairs — Household Purposes — Cleaning Machinery.

The provision in the policy prohibiting the keeping, using, or allowance of benzine, gasoline, etc., applies to the habitual keeping, using, or allowing of the same, and not to their occasional introduction for a temporary purpose ordinarily and necessarily connected with the occupation of the premises,¹ such as the making of ordinary or necessary repairs;² so the temporary having of a small quantity of gasoline on insured premises, to be used for household purposes, other than for fuel;³ or the use of gasoline by female inmates of house to clean their clothes, being brought upon the premises in pint or quart bottles,⁴ does not void the policy. A temporary use of benzine in an insured dwelling to clean carpets and furniture is not such an increase of risk as to void the insurance.⁵ So temporary and occasional use of benzine for cleaning machinery;⁶ or occasional use of gasoline to kill cockroaches⁷ does not void the insurance.

1. *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. Rep. 236, 25 Ins. L. J. 192, 30 L. R. A. 368. And see *Hinckley v. Germania Ins. Co.*, 140 Mass. 38; *Farmers & Mechanics' Ins. Co. v. Simmons*, 30 Pa. St. 299; *Springfield F. & M. Ins. Co. v. Wade*, Tex. , 68 S. W. Rep. 977; *State Ins. Co. v. Hughes*, 10 Lea, 461 (Tenn.); *Hynds v. Schenectady Ins. Co.*, 11 N. Y. 554; *Merchants' Ins. Co. v. Washington Ins. Co.*, 1 Handy, 408 (Ohio). And see Rule 20.

2. *Smith v. German Ins. Co.*, *supra*.

3. *Springfield F. & M. Ins. Co. v. Wade*, Tex. , 68 S. W. Rep. 977. And see *Firemen's Fund Ins. Co. v. Shearman*, 20 Tex. Civ. App. 343, 50 S. W. Rep. 598.

4. *Columbia Planing Mill Co. v. American Ins. Co.*, 59 Mo. App. 204.

5. *Bentley v. Lumbermen's Ins. Co.*, 191 Pa. St. 276, 43 Atl. Rep. 209.

6. *Humboldt Ins. Co. v. Mears*, Pa. St. , 11 Ins. L. J. 847.

7. *La Force v. Williamsburg City Ins. Co.*, 43 Mo. App. 518. In *Dobson v. Sotheby*, 1 Moody & M. 90, 22 Eng. C. L. 481, the policy was on a building "where no fire is kept, and no hazardous goods deposited." A tar barrel was introduced and from it the building caught fire. And it was held that the condition referred to the habitual use of fire, and the ordinary deposit of goods, not to the occasional introduction.

This old case is probably the origin of the doctrine or rule stated in the text.

RULE 22.

Limitation of Preceding Rule.

The doctrine of temporary use ordinarily and necessarily connected with occupancy (see Rule 21) does not extend or apply to a case when the insured buys and places a lot of fireworks in his residence for use on the next day, being the fourth of July, taking fire the same day, causing the damage for which the claim is made.

Heron v. Phoenix Ins. Co., 180 Pa. St. 257, 36 Atl. Rep. 740, 26 Ins. L. J. 690.

In *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 12 Ins. L. J. 834, it was held that a temporary use of naphtha immediately preceding the fire, for purpose of destroying moths in wool, voided the insurance.

RULE 23.

Written Description Construed as Agreement Providing Otherwise.

When the written description of the property insured covers and includes the prohibited articles like gasoline, benzine, etc., it is construed as an agreement, providing otherwise than as stated in the printed con-

dition, indorsed on the policy, or added thereto, according to its terms.

Ackley v. Phoenix Ins. Co., 25 Mont. 272, 64 Pac. Rep. 665. And see *Phoenix Ins. Co. v. Walters*, 24 Ind. App. 87, 56 N. E. Rep. 257; *Hall v. Insurance Co. N. A.*, 58 N. Y. 292.

RULE 24.

Effect of Written Description — Evidence — Risk of Particular Business.

When the written description of property insured, or containing that insured, describes and assumes the risk of a particular business, the keeping of an article necessarily used in such business, like benzine or gasoline, will not void the policy unless it is shown that it was kept in unnecessarily large quantities, or for purposes not contemplated by the policy;¹ when the policy covers a building occupied as a furniture store and repair shop, the keeping of benzine for necessary use in the repair shop does not void the insurance;² so when the policy covers "watchmaker's materials," parol evidence is admissible to show that the phrase includes benzine;³ or when property insured is "merchandise in a drug store," the keeping and storing of one pound of ether, same being shown to be a necessary part of such merchandise, does not void the policy.⁴ So when description is "such other merchandise as is usually kept for sale in a retail hardware store," the insured has the right to carry a small quantity of dynamite, it being shown that it was customary among merchants in the vicinity to keep this

article in stock, and the question of custom is one for the jury.⁵

1. *Davis v. Pioneer Furniture Co.*, 102 Wis. 394, 78 N. W. Rep. 596, 28 Ins. L. J. 474. And see *Fraim v. National Ins. Co.*, 170 Pa. St. 151, 32 Atl. Rep. 613; *Fraim v. Manchester Ins. Co.*, 170 Pa. St. 166, 32 Atl. Rep. 616; *Faust v. American Ins. Co.*, 91 Wis. 158, 64 N. W. Rep. 883, 25 Ins. L. J. 176, 30 L. R. A. 783; *Maril v. Connecticut Ins. Co.*, 95 Ga. 604, 23 S. E. Rep. 463; *Mechanics & Traders' Ins. Co. v. Floyd*, 49 S. W. Rep. 543 (Ky.); *Virginia F. & M. Ins. Co. v. Thomas*, 90 Va. 658, 19 S. E. Rep. 454; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *White v. Western Assur. Co.*, Pa. St. , 16 Ins. L. J. 233; *Harper v. Albany Ins. Co.*, 17 N. Y. 194; *Harper v. City Ins. Co.*, 1 Bosw. 520, aff'd, 22 N. Y. 441; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Archer v. Merchants' Ins. Co.*, 43 Mo. 434; *Steinbach v. LaFayette Ins. Co.*, 54 N. Y. 90; *Hall v. Insurance Co. N. A.*, 58 N. Y. 292; *Harper v. New York City Ins. Co.*, 22 N. Y. 441; *Harper v. Albany Ins. Co.*, 17 N. Y. 194; *Bryant v. Poughkeepsie Ins. Co.*, 17 N. Y. 200; *Mayor v. Hamilton Ins. Co.*, 10 Bosw. 537 (N. Y.); *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 450.

2. *Faust v. American Ins. Co.*, *supra*.

3. *Maril v. Connecticut Ins. Co.*, *supra*.

4. *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673.

5. *Traders' Ins. Co. v. Dobbins*, Tenn. , 86 S. W. Rep. 383.

The courts do not agree as to effect of the printed conditions prohibiting certain articles, when it is claimed they are covered or included by words of general description in the written part of the policy. When policy was upon stock of fancy goods * * * "and other articles in his (assured's) *line of business*," it was held that if keeping of fireworks was in his line of business the company was liable.

Steinbach v. LaFayette Ins. Co., 54 N. Y. 90; whereas in same *v. Relief Ins. Co.*, 13 Wall. 183 (U. S.), it was held to the contrary.

"Stock of merchandise" does not include a prohibited article, though same may be usually kept.

Birmingham Ins. Co. v. Kroegher, 83 Pa. St. 64.

"Stock usually kept for sale in a country store" does not permit the keeping of gunpowder.

Cobb v. Insurance Co. N. A., 17 Kans. 492.

"Drugs and medicines" may include saltpetre kept in small quantities as a drug.

Collins v. Insurance Co., 79 N. C. 279.

"General merchandise all kinds usually kept in a country retail store" did not include, cover, or permit benzine even though usually kept in country stores. This case appears to have been so decided upon construction that the insurance was in terms against loss or damage *except* as hereinafter provided.

"Stock of drugs and medicines and merchandise usually kept in country stores," covers or permits benzine if a drug or usually kept. It is a question for the jury.

Carrigan v. Lycoming Ins. Co., 53 Vt. 418, 10 Ins. L. J. 606.

"Stock of wholesale grocer comprising all kept for sale in such stocks" may cover or permit saltpetre, though prohibited by printed condition.

Stout v. Commercial Union Assur. Co., 12 Fed. Rep. 554, 11 Biss. 309.

"Stock of fancy goods and Yankee notion store," if firecrackers and fireworks constitute a part of an ordinary and usual stock of fancy goods and Yankee notions, the keeping of same does not void the insurance.

Barnum v. Merchants' Ins. Co., 97 N. Y. 188, 14 Ins. L. J. 50.

"Stock of family groceries, wines, liquors, tobacco and cigars" does not allow or permit keeping of fireworks as part of stock described, in absence of evidence to such effect.

Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366.

"General stock of hardware and agricultural implements" does not include gunpowder, and proof of usage or custom to keep it as part of stock is not admissible.

Beer v. Insurance Co., 39 Ohio St. 109. And see *Mason v. Hartford Ins. Co.*, 29 Up. Can. Q. B. 585.

"Stock of general merchandise, consisting of dry goods, clothing and groceries," does not permit gunpowder even though custom includes it in general merchandise.

Liverpool, L. & G. Ins. Co. v. Van Os, 63 Miss. 431.

"Stock of candies, toys, fruit, and all such other stuff usually kept for sale in confectionery stores," may permit fireworks when shown to be usually kept, etc.

Plinsky v. Germania Ins. Co., 32 Fed. Rep. 47.

"General store" may permit proof as to quantity usually kept in a general store.

Barnard v. National Ins. Co., 27 Mo. App. 26.

When policy issued to a druggist covered his stock of drugs, chemicals, and other merchandise, "hazardous and extra-hazardous," it was held that the policy was not rendered void on ac-

count of a fire occasioned by the insured putting upon a stove about five gallons of an inflammable ointment for purpose of warming it, it being usual for druggist to mix and melt ointments in that manner.

Brown v. Kings County Ins. Co., 31 How. 508 (N. Y.).

RULE 25.

Limitation of Rule as to Assumption of Risk of Particular Business.

The preceding rule as to the assumption of risk of a particular business does not extend to a case where the use of gasoline is unnecessary in the prosecution of the business, even though it may be customary to so use it in the particular business; as, for instance, when a dealer in stoves and tinware was accustomed to use gasoline in exhibiting and explaining his stoves to purchasers.

Fischer v. London & Lancashire Ins. Co., 83 Fed. Rep. 807, 27 Ins. L. J. 417. And see *Harper v. City Ins. Co.*, 1 Bosw. 520, aff'd, 22 N. Y. 441.

RULE 26.

A Sale Incidental to a Business Does not Permit Manufacture.

Insurance of building occupied by dealer in photograph supplies, while it might allow the customary sale of flashlight powder in small packages as incidental to the business, does not permit the manufacture of such a powder, and being an explosive, if it causes an explosion, followed by fire, the insurance company is not liable.

Lutz v. Royal Ins. Co., 205 Pa. St. 159, 54 Atl. Rep. 721.

RULE 27.

Drawing of Kerosene.

While the written description may cover and include the keeping and sale of kerosene oil, it is, nevertheless, subject to the printed condition that it shall be drawn by daylight or not less than ten feet from artificial light. The policy is void if kerosene be drawn in any other manner than that so provided.

Vandervolgen v. Manchester Assur. Co., 123 Mich. 291, 82 N. W. Rep. 46; *Gunther v. Liverpool, L. & G. Ins. Co.*, 134 U. S. 110, 10 Sup. Ct. Rep. 448, 19 Ins. L. J. 417, aff'g 34 Fed. Rep. 501. And see previous appeal, 116 U. S. 113, 15 Ins. L. J. 161, rev'g 20 Blatchf. 362.

RULE 28.

Keeping of Gunpowder.

When the policy permits the keeping of gunpowder not exceeding twenty-five pounds and other merchandise not more hazardous usual to general stocks of merchandise, the keeping of three or four boxes of squibs holding a pound of gunpowder does not void the insurance.

Mechanics & Traders' Ins. Co. v. Floyd, Ky. , 49 S. W. Rep. 543.

RULE 29.

Effect of Permission to be Occupied for "Hazardous or Extra-Hazardous" Purposes.

When the policy permits a building "to be occupied for hazardous or extra-hazardous purposes" it permits the use of benzine and gasoline in a paint factory, notwithstanding the printed prohibition. The latter

cannot be construed as a qualification or limitation of the written privilege.

Russell v. Manufacturers & Builders' Ins. Co., 50 Minn. 409, 52 N. W. Rep. 906, 21 Ins. L. J. 944.

RULE 30.

Usage or Custom — Ambiguity in Description.

Evidence of usage or custom may be admissible when the descriptive words in the policy are ambiguous or uncertain in their meaning and application.

Liverpool, L. & G. Ins. Co. v. Van Os, 63 Miss. 431.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Description," Rule 4; "Construction," Rules 17-25.

RULE 31.

Opinion Evidence — Experts.

When the question is whether prohibited articles are included under words of general or uncertain description, it is not to be answered by experts whose opinions are not admissible, but by an investigation of the facts.

Steinbach v. La Fayette Ins. Co., 54 N. Y. 90.

RULE 32.

Keeping or Use by Tenant.

The fact of violation of the terms of the policy or of a permit for use of prohibited article is a sufficient defense to an action on the policy, though such prohibited keeping or use is by a tenant without knowledge of the insured, and whether it be shown that the fire resulted from such violation or not.

Thuringia Ins. Co. v. Norwayz, 104 Ill. App. 390, aff'd, 204 Ill. 334, 68 N. E. Rep. 551; *Badger v. Platts*, 68 N. H. 222,

44 Atl. Rep. 296; *Kohlmann v. Selvage*, 34 App. Div. 380, 54 N. Y. Supp. 230. And see *German Ins. Co. v. Shawnee County*, 54 Kans. 732, 39 Pac. Rep. 697, 25 Ins. L. J. 466; *Liverpool, L. & G. Ins. Co. v. Gunther*, 116 U. S. 113, 15 Ins. L. J. 161, rev'g 20 Blatchf. 362.

Exception.—It was held in *East Texas Ins. Co. v. Kempner*, 12 Tex. Civ. App. 534, 34 S. W. Rep. 393, that the policy was not rendered void by tenant's use of a gasoline stove without the knowledge of the assured. This case, however, appears to have been decided on an issue of increase of risk.

See this volume, "Increase of Hazard."

RULE 33.

Waiver or Estoppel When Policy Issues — After Issue.

Issue and delivery of the policy with knowledge by the company or its agent of existing facts constituting a violation of the clause or condition as to prohibited articles operates as a waiver or estoppel, preventing the company from claiming a forfeiture by reason of such facts;¹ and in some of the States verbal permission of company's agent, even after issue of the policy, may operate as evidence of a waiver or estoppel;² but a mere soliciting agent, without evidence of authority otherwise, cannot bind the company by a verbal consent to the use of prohibited article by the insured.³ And the fact that the company had knowledge of the use of prohibited article by a former tenant does not justify a finding that assured had permission for its continued or future use.⁴

1. *Cassimus v. Scottish Union & Nat. Ins. Co.*, 135 Ala. 256, 33 So. Rep. 163; *Hartley v. Pennsylvania Ins. Co.*, Minn. , 98 N. W. Rep. 198; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Winans v. Allemania Ins. Co.*, 38 Wis. 342; *Bennett v. North British & M. Ins. Co.*, 81 N. Y. 273; *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; *Kings County Ins. Co. v. Swigert*, 11 Ill. App. 590; *Rivara v. Queens Ins. Co.*, 62 Miss. 720; *Kruger*

v. Western F. & M. Ins. Co., 72 Cal. 91, 13 Pac. Rep. 156; *Kenton Ins. Co. v. Downs*, 13 S. W. Rep. 882, 19 Ins. L. J. 923; *Farmers' Ins. Co. v. Nixon*, 2 Colo. App. 265, 30 Pac. Rep. 42, 21 Ins. L. J. 860; *Insurance Co. N. A. v. Melvin*, 1 Walker, 362 (Pa.); *Couch v. Rochester German Ins. Co.*, 25 Hun, 469; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 326, 450, 15 Ins. L. J. 184.

2. *Merchants' Ins. Co. v. Oberman*, 99 Ill. App. 357.

That mere knowledge of the agent does not operate as a waiver or estoppel, see *Fischer v. London & Lancashire Ins. Co.*, 83 Fed. Rep. 807; *West End Hotel Co. v. American Ins. Co.*, 74 Fed. Rep. 114.

And as to the subject of "Waiver" see also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," compare the various Rules 8, 9, 12, 16, 27, and 28. And see this volume, "Agents."

3. *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; *Garetson v. Merchants' Ins. Co.*, 81 Iowa, 727, 45 N. W. Rep. 1047, 19 Ins. L. J. 913; *Liverpool, L. & G. Ins. Co. v. Van Os*, 63 Miss. 431.

4. *Minzesheimer v. Continental Ins. Co.*, 5 Jones & Sp. 332 (N. Y.).

RULE 34.

Waiver as to Use of Small Quantity not Extended.

The company's knowledge of the use of a small quantity of a prohibited article (saltpetre) to preserve stock of meat insured, is no waiver of a defense founded upon the keeping of a quantity and as merchandise on sale, whether such keeping be dangerous or not.

Commercial Ins. Co. v. Mehlman, 48 Ill. 313.

RULE 35.

Burden of Proof.

The burden of proof in establishing a violation of the condition rests upon the insurance company;¹ the existence of an oil pump in the house insured, not used at time of the fire, nor six months previously, is not

sufficient evidence that gasoline was stored on the insured premises, or, if so, that it was adjacent, near, or close to the building.²

1. *Phoenix Ins. Co. v. Shearman*, 17 Tex. Civ. App. 456, 43 S. W. Rep. 930; *Willis v. Germania Ins. Co.*, 79 N. C. 285. And see *Hicks v. Empire Ins. Co.*, 6 Mo. App. 254; *Rau v. Westchester Ins. Co.*, 50 App. Div. 428, 64 N. Y. Supp. 290, aff'd, 168 N. Y. 665, without opinion.

2. *Hanover Ins. Co. v. Stoddart*, 52 Nebr. 745, 73 N. W. Rep. 291, 27 Ins. L. J. 120.

RULE 36.

Article May not be Prohibited yet Violate Condition as to Increase of Hazard — Question of Fact.

A certain article may not come within the terms of the prohibitory condition, yet that does not prevent the same thing coming within the legal operative force of the condition against an increase of hazard. The latter is a question of fact which, if found affirmatively, renders the policy void;¹ no matter how large or how small the quantity may be, it is a question of fact for a jury to determine.²

1. *Williams v. People's Ins. Co.*, 57 N. Y. 274. And see *Jones v. Firemen's Fund Ins. Co.*, 51 N. Y. 318.

2. *Williams v. People's Ins. Co.*, *supra*.

And see this volume, "Increase of Hazard."

Note as to changes in language.—The express restriction as to lights would seem to prevent the application of the construction by the court of the old form which did not contain it in *Carlin v. Western Assur. Co.*, 57 Md. 515, 12 Ins. L. J. 388. And so the change in the language as to usage or custom of trade would seem to render inapplicable the ruling or reasoning of the court in *Pittsburg Ins. Co. v. Frazee*, 107 Pa. St. 521, 14 Ins. L. J. 512. But see Rules 23–26.

Some of the old forms provided that "this company will not be liable for any loss, occasioned by camphene or other inflammable liquid," and it was held to mean, not that the fire must

originate with the camphene, by its own ignition, but as a medium of its communication from outside or other cause, thus occasioning a fire which would not have happened but for the presence of that article on the premises.

Harper v. City Ins. Co., 1 Bosw. 520, aff'd, 22 N. Y. 441.

Some provided that "if gunpowder or other articles subject to legal restriction should be kept in greater quantities or in a different manner than was provided by law" the policy should be void, and it was held to have reference only to articles of an intrinsically dangerous nature, as liable to cause injury accidentally or by carelessness, and not to refer to liquors, the traffic in which was made illegal by statute.

Niagara Ins. Co. v. De Graff, 12 Mich. 124.

Other forms provided that "whenever any article subject to legal restriction should be kept in quantity or manner different from that allowed by law, unless the use or keeping was specially provided for in the policy," it should be void.

Jones v. Firemen's Fund Ins. Co., 51 N. Y. 318.

Some prohibited the use of kerosene oil, except in dwellings, and it was held that the policy was rendered void by the use of such oil in a lamp left upon the counter of a store, as a protection against burglars, and that the store could not be considered a dwelling because the clerk slept in a small room back of the store.

Cerf v. Home Ins. Co., 44 Cal. 320.

And so under a similar condition prohibiting "petroleum, or crude earth or coal oils, except kerosene oil for lights in dwellings," it was held that the use of "headlight oil," being a petroleum product for lights in a factory, constituted a breach of the condition.

Couch v. Rochester German Ins. Co., 25 Hun, 469 (N. Y.).

The term "refined coal or earth oils" was held not to include kerosene.

Morse v. Buffalo Ins. Co., 30 Wis. 534.

Some provided that the insurance should "immediately cease if the assured uses naphtha," and it was held that the insurance ceased when his use of naphtha involved the insured property in a substantial naphtha risk.

Wheeler v. Traders' Ins. Co., 62 N. H. 326.

Others that the company would not be liable "for the use of kerosene," and it was held that the insurance was not affected by the use of kerosene if the loss was not caused by such use.

Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. Rep. 578.
And see *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310.

Some prohibited use of building "for purpose of storing or

keeping" such articles as were within a clause relating to hazardous articles, and it was held that the keeping of articles to be exhibited or used as means of a public exhibition was not a use of the building for purpose of storing or keeping therein.

Mayor v. Hamilton Ins. Co., 10 Bosw. 537 (N. Y.).

Some prohibited "storing," and that "keeping" for purpose of retailing was not storing. That storing meant in the condition a keeping for safe custody, to be delivered out in the same condition, substantially the same as when received, and applied only when the storing or safe-keeping was the principal object of the deposit, and not when it was merely incidental.

New York Equitable Ins. Co. v. Langdon, 6 Wend. 623 (N. Y.), aff'g 1 Hall, 226.

As to effect of the addition or insertion of the word "keeping," see *Hynds v. Schenectady Ins. Co.*, 11 N. Y. 554.

Many prohibited "storing and keeping" and it was held that the words meant storing or keeping in a mercantile sense, in considerable quantities, with view to commercial traffic, and could not be construed to forbid the keeping and use of several quarts of crude petroleum as a medicine.

Williams v. Firemen's Fund Ins. Co., 54 N. Y. 569.

And it was held that keeping a small quantity of saltpetre for purpose of preserving meat was not a "storing" of it.

Bayly v. Lancashire Ins. Co., 4 Ins. L. J. 503 (U. S. Cir.).

A condition against keeping or storing oil on premises was held not broken by the fact that there was a gallon kept for lubricating purposes.

Mitchell v. City of London Assur. Co., 15 Ont. App. 262.

Some prohibited "lighting the premises insured by a camphene or spirit gas," and it was held to apply to insurance on merchandise as well as on buildings.

Stettiner v. Granite Ins. Co., 5 Duer, 594 (N. Y.).

Some prohibited "the generating or evaporating within the building or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting," and it was held that a building fifty feet distant was not contiguous, and that the condition did not prohibit the use of gas for lighting if made from gasoline; that gasoline and gas do not mean the same thing.

Arkell v. Commerce Ins. Co., 69 N. Y. 191, aff'g 7 Hun, 455.

Some provided that "petroleum, rock and earth oils should not be stored or used and that camphene, spirit gas or burning fluid, phosgene or any other inflammable liquid should not be used in factories as light," and it was held that this did not prohibit the keeping of kerosene oil for lights in a paper

mill to extent of a reasonable quantity (forty gallons), that the kerosene was not stored, and that its use for lights was not prohibited, it being proved that it was not properly classified as an "inflammable liquid."

Buchanan v. Exchange Ins. Co., 61 N. Y. 26.

Others provided that "if camphene, burning fluid or refined or earth oils are kept for sale, stored or used on the premises without written consent" policy should be void, and it was held that this did not prohibit ordinary use of kerosene for lighting purposes.

Bennett v. North British & M. Ins. Co., 81 N. Y. 273, aff'g 8 Daly, 471.

Some of the old forms were construed to prohibit "storing" and not to prohibit "keeping" for sale.

Renshaw v. Missouri State Ins. Co., 103 Mo. 595, 15 S. W. Rep. 945, 20 Ins. L. J. 385.

Some required "groceries and gunpowder to be specified and to pay a higher rate of premium," and it was held that the keeping of gunpowder voided the policy.

Fire Assoc. v. Williamson, 26 Pa. St. 196.

Some prohibited "the storing of gunpowder on the premises," and it was held that the placing of gunpowder in a building with a lighted match for the purpose of blowing it up, to prevent the spread of a conflagration, was not a "storing" of it.

City Ins. Co. v. Corlies, 21 Wend. 367 (N. Y.).

Some provided that "the keeping of gunpowder for sale or on storage upon or in the premises insured," should void the policy, and it was held that where none was sold or offered for sale after the policy issued, the fact that the insured had a small quantity in his store and for sale, before it issued, did not void the policy.

Protection Ins. Co. v. Harmer, 2 Ohio St. 452.

And that the word "premises" referred to *buildings insured*, and that gunpowder was not kept upon or in the premises insured, when kept by a storekeeper whose *stock* was insured.

Leggett v. Ætna Ins. Co., 10 Rich. Law, 202 (S. C.). And see Mosley v. Vermont Ins. Co., 55 Vt. 142, 13 Ins. L. J. 97.

And it was held that the keeping of fireworks was not a violation of a clause prohibiting the keeping or using of gunpowder upon the premises.

Tischler v. California Ins. Co., 66 Cal. 178.

Some required the gunpowder to be kept in tin or metallic canisters, in any amount, and not exceeding twenty-five pounds.

Bowman v. Pacific Ins. Co., 27 Mo. 152.

Others limited quantity of gunpowder to one barrel.

Insurance Co. v. Slaughter, 12 Wall. 404.

Giant powder is nitro-glycerine under the terms of the policy, and the prohibition cannot be waived by any parol understanding at the time the policy issues, nor can custom or usage avoid the consequences of violation of such prohibition.

Sperry v. Springfield F. & M. Ins. Co., 26 Fed. Rep. 234, 15 Ins. L. J. 270.

TITLE V.

Vacant or Unoccupied.

- RULE**
1. As imposed by contract.
 2. Condition reasonable and binding.
 3. Condition subsequent — Burden of proof.
 4. Construction not governed by rules of a board of fire underwriters — Nor by those of the company.
 5. Effect of action by board of underwriters.
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 9. Making repairs does not constitute occupancy.
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 18. Not necessary to claim risk increased — Effect of statute — Question of fact — Evidence — Expert — Custom.
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 20. Divisibility of contract.
 21. When policy not divisible.
 22. Construction of "occupied" and "unoccupied" — Governed by nature and character of building and use — Knowledge of company's agent.

- RULE 23.** Construction as affected by description — Effect not limited to building.
24. When nature or character of occupation changed.
 25. Meaning of “vacant” or “unoccupied” as applied to a dwelling.
 26. When house unoccupied — Occupancy of house and barn.
 27. Furniture remaining in dwelling does not constitute occupancy or living in it.
 28. House may not be vacant and yet be unoccupied.
 29. Occupation of a dwelling — Temporary absence — Governed by intention — Question of fact.
 30. Temporary absence from dwelling.
 31. Use of house for partial purpose of a dwelling.
 32. Cleaning of dwelling not occupation.
 33. Effect of sleeping in house.
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 35. Ceasing to be occupied for one of several purposes described does not void policy.
 36. Dwelling described as a family residence — Construction of the word “family.”
 37. When tenement-house vacant and unoccupied.
 38. Construction of the word “vacating.”
 39. Temporary vacancy on change of tenants — Temporary absence.
 40. Time limitation as affecting construction of old forms.
 41. Occupancy of building used for manufacturing purposes.
 42. When mill or factory vacant or unoccupied.
 43. Occupancy of manufacturing establishment governed by known use and character.
 44. When flouring mill not vacant or unoccupied.
 45. When a tannery is occupied.
 46. Occupancy of a boat.
 47. When a storehouse vacant and unoccupied.
 48. When a store is unoccupied.
 49. When a church is vacant or unoccupied.
 50. When an icehouse vacant or unoccupied — Question of fact.
 51. When elevator vacant or unoccupied.
 52. Occupancy of saloon or storehouse.
 53. Construction and application of Rule 1 as affecting waiver or estoppel.
 54. Time limitation as affecting waiver.

- RULE 55. Waiver or estoppel when policy issues — Duty of agent — Building in process of erection.
56. Special permit for vacancy of uncompleted building.
57. Knowledge of soliciting agent.
58. Knowledge of agent as affecting occupancy for other purposes than as described.
59. Effect of knowledge as to future nonoccupancy.
60. No oral waiver after issue of policy — May be estoppel — Mere knowledge no estoppel.
61. Waiver or estoppel after issue of policy.
62. Estoppel by agent — Written permit effective.
63. Receiving premium after fire.
64. Question of law or fact.
65. Question of increase of hazard one of fact — Change of occupants permitted.

RULE 1.

As Imposed by Contract.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
Connecticut,
Louisiana,
Missouri,
New Jersey,

North Carolina,
North Dakota,
*Pennsylvania,
Rhode Island.

The standard form of policy prescribed in Michigan is the same, except there is added:

“Provided a loss shall occur on the property insured while such breach of condition continues, or such breach of condition is the primary or contributory cause of the loss.”

* See note to “Concealment,” Rule 1, page 2.

The standard form of policy prescribed in Wisconsin is the same, except there is added:

“And continuing until the time of the fire.”

The standard form of policy prescribed in

Maine,

Massachusetts,

provides:

“This policy shall be void if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days, without the assent in writing or in print of the company.”

The standard form of policy prescribed in Minnesota provides:

“The policy shall be void if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without the assent of the company.”

The standard form of policy prescribed in New Hampshire provides:

“This policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: * * * if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days, without the assent in writing or in print of the company.” It is furthermore provided by statute made part of the policy: “A change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, shall not affect the policy except while the change or breach continues.”

The standard form of policy prescribed in South Dakota provides:

“This policy shall be void if the premises hereby insured shall remain vacant and unoccupied for more than thirty days without the assent of the company.”

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

The purpose of the Minnesota statute (chap. 175, Laws 1895), § 25, requiring an examination of the property insured before issue of policy is not to determine whether the premises are

occupied and has no relation to that subject. The failure of the company to so inspect or examine is evidence of a waiver of the right to claim premises of less value than that fixed in the policy, but cannot be construed as charging it with notice that the premises were vacant.

Aiple v. Boston Ins. Co., 92 Minn. 337, 100 N. W. Rep. 8.

See Vol. 1, Fire Insurance as a Valid Contract, "Statutory Provisions," Minnesota.

RULE 2.

Condition Reasonable and Binding.

The condition in regard to vacancy is recognized and enforced by the courts as a reasonable and proper provision binding upon the insured.

Hackett v. Philadelphia Underwriters, 79 Mo. App. 16; *Bartlett v. British American Assur. Co.*, 35 Wash. 525, 77 Pac. Rep. 812; *Piscatequa Savings Bank v. Traders' Ins. Co.*, 8 Kans. App. 241, 55 Pac. Rep. 496; *Royal Ins. Co. v. Lubelsky*, 86 Ala. 530; *Burner v. German-American Ins. Co.*, 103 Ky. 370, 45 S. W. Rep. 109, 27 Ins. L. J. 732; *Phoenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. Rep. 865; *Thomson v. Southern Mutual Ins. Co.*, 90 Ga. 78, 15 S. E. Rep. 652, 21 Ins. L. J. 1043; *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. Rep. 326, 27 Ins. L. J. 794; *Bruce v. Phoenix Ins. Co.*, 24 Oreg. 486, 34 Pac. Rep. 16; *Lester v. Mississippi Home Ins. Co.*, 19 So. Rep. 99 (Miss.); *Assurance Co. v. McPike*, 62 Miss. 740; *Copp v. Home Ins. Co.*, 89 Hun, 611, 35 N. Y. Supp. 1105; *Ridge v. Scottish Commercial Ins. Co.*, 9 Lea, 507 (Tenn.); *Sun Fire Office v. Hodges*, 3 Tex. Ct. App. Civ. Cas., § 268; *Watertown Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. Rep. 876; *Burlington Ins. Co. v. Gibbons*, 43 Kans. 15, 22 Pac. Rep. 1010, 19 Ins. L. J. 546.

RULE 3.

Condition Subsequent — Burden of Proof.

Those clauses which provide that the policy shall become void, or that company shall be relieved wholly or partially, upon the happening of some event, or the doing or omission to do some act are not in any proper

sense conditions precedent. If conditions, they are conditions subsequent, and matters of defense, which, together with their breach, must be pleaded by the insurance company, and the burden of establishing it rests upon the company. Hence it is not incumbent upon the insured to prove that house was occupied, but upon the defendant to prove that it was vacant and unoccupied.

Moody v. Insurance Co., 52 Ohio St. 12, 38 N. E. Rep. 1011, 24 Ins. L. J. 81, 26 L. R. A. 313.

RULE 4.

Construction not Governed by Rules of a Board of Fire Underwriters — Nor by Those of the Company.

The construction of the condition as to vacancy is not governed by that of the rules of a board of fire underwriters; the meaning and application are governed by the ordinary sense of the words used;¹ nor does a rule of the company, in granting permits for vacancy, affect the contract or policy as actually made and issued.²

1. *Stone v. Granite State Ins. Co.*, 69 N. H. 438, 45 Atl. Rep. 235.

2. *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570, 23 N. E. Rep. 498, 19 Ins. L. J. 492.

RULE 5.

Effect of Action by Board of Underwriters.

Neither implied permission for nonoccupancy nor estoppel can be based upon the action of a local board of underwriters of which defendant company's agent is a member, having power to establish rates and classify risks, in voting that permission be granted

free of charge for the hotel property in question to be unoccupied a portion of the year, such action not being communicated to the owner of the property or assured, and there being no application for a vacancy permit. Such action of the board is in effect simply permission to the insurance companies to grant vacancy permits free of charge if they chose.

Quinsigamond Steamboat Co. v. Phoenix Ins. Co., 172 Mass. 367, 52 N. E. Rep. 531, 28 Ins. L. J. 211. And see subsequent appeal, 177 Mass. 10, 58 N. E. Rep. 174.

RULE 6.

Not Dependent upon Insured's Knowledge or Control, or that Breach Willful.

The condition as to the effect of the premises insured becoming vacant or unoccupied can, on no principle of construction, be made to depend upon the assured's knowledge of the fact;¹ or his control;² or that breach is willful and substantial.³

1. *Schuermann v. Dwelling-House Ins. Co.*, 161 Ill. 437, aff'g 57 Ill. App. 200; *McClure v. Watertown Ins. Co.*, 90 Pa. St. 277. And see *Sleeper v. Insurance Co.*, 56 N. H. 401.

2. *Moriarty v. Home Ins. Co.*, 53 Minn. 549, 55 N. W. Rep. 740.

3. *Watertown Ins. Co. v. Cherry*, 84 Va. 72, 3 S. E. Rep. 876.

Under old forms which read "if premises shall become vacant and unoccupied, or the risk be increased by erection of neighboring buildings, or by any means whatever within the control of the assured" policy should be void, it was held that house being vacant, assured could not recover without proof that the vacation was beyond his control.

Insurance Co. N. A. v. Zaenger, 63 Ill. 464. And see *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *American Central Ins. Co. v. Clarey*, 28 Ill. App. 195.

And so when condition was "if premises shall become vacant"
* * * and policy was on an outbuilding it was held that the

insurance was not forfeited by a disuse of such building, the other buildings on the premises remaining occupied.

Kimball v. Monarch Ins. Co., 70 Iowa, 514.

But see *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162, where the words "above-mentioned premises" were held to be used distributively and to be applied to each item of property as separately stated in the policy.

RULE 7.

Distinction Between "Vacant or Unoccupied" and "Vacant and Unoccupied."

There is a material distinction in the use and application of the language "vacant *or* unoccupied," and "vacant *and* unoccupied;"¹ though vacant and unoccupied may be construed as the equivalent of each other.² A vacant house is literally an empty house; one or more persons may live in a house, and in either case it is occupied; they may have much or little furniture and in neither event is it vacant.³

1. *Hoover v. Mercantile Ins. Co.*, 93 Mo. App. 111, 69 S. W. Rep. 42; *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162; *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184. And see *Huber v. Manchester Ins. Co.*, 92 Hun, 223, 36 N. Y. Supp. 873.

2. *Dohlantry v. Blue Mounds Ins. Co.*, 83 Wis. 181, 53 N. W. Rep. 448.

3. *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 133.

RULE 8.

Property May be Vacant in Part.

Property insured may be vacant in part, without voiding the insurance.

Bryan v. Peabody Ins. Co., 8 W. Va. 605. And see *Burlington Ins. Co. v. Brockway*, 39 Ill. App. 43, aff'd, 138 Ill. 644, 28 N. E. Rep. 799, 21 Ins. L. J. 624.

RULE 9.

Making Repairs Does not Constitute Occupancy.

The fact that mechanics are employed in a building making repairs under a permission in the policy does not constitute occupancy;¹ nor does plastering and whitewashing constitute occupancy.²

1. *Limburg v. German Ins. Co.*, 90 Iowa, 709, 57 N. W. Rep. 626, 23 Ins. L. J. 321. And see *Snyder v. Firemen's Fund Ins. Co.*, 78 Iowa, 146, 42 N. W. Rep. 630.

2. *Barry v. Prescott Ins. Co.*, 35 Hun, 601.

RULE 10.

Effect of Written Permission for Vacancy.

A written permit for vacancy of insured property is operative from the time of the delivery of the policy by the insured to the company's agent for the purpose without regard to the time when such permit is in fact attached;¹ and supersedes or controls the printed condition,² when made by an agent having authority.³ A permit without time limitation may be construed to cover any subsequent vacancy, provided its terms are complied with.⁴

1. *Sullivan v. Germania Ins. Co.*, 89 Mo. App. 106.

2. *Joy v. Pennsylvania Ins. Co.*, 35 Mo. App. 165.

3. *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. Rep. 77.

4. *Steen v. Niagara Ins. Co.*, 89 N. Y. 315, 11 Ins. L. J. 523.

RULE 11.

When Description not Construed a Warranty.

If building insured is described as "occupied for store and dwelling purposes and saloon," the descrip-

tion will not be construed as a warranty, if permission for thirty days' vacancy from date of policy is indorsed thereon when it issues.

Pabst Brewing Co. v. Union Ins. Co., 63 Mo. App. 663.

RULE 12.

Permission for Unoccupancy May Extend to Renewals — Construction of the Words "During the Summer."

A permission for the insured to leave house unoccupied during the summer of each year, indorsed upon or inserted in the original policy, extends to all renewals of the policy, and the words "during the summer" may be construed to mean the "farming season," when so understood by the company's agent when he issued the policy.

Vanderhoef v. Agricultural Ins. Co., 46 Hun, 328. And as to effect of agent's construction of meaning, see also *Steen v. Niagara Ins. Co.*, 89 N. Y. 315; *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, 44 N. W. Rep. 1106.

RULE 13.

Oral Application and no Inquiry do not Prevent Forfeiture.

The fact that the application for the insurance is made orally, without any representation by the insured, and without any inquiry by the insurance company, does not prevent forfeiture of the insurance for a breach or violation of the condition.

Bartlett v. British American Assur. Co., 35 Wash. 525, 77 Pac. Rep. 812.

RULE 14.

Effect of Time Limitation.

The limitation of time does not define the words "vacate" and "unoccupied," which must therefore

be given the meaning which usually attaches to them. If a house is never vacant nor unoccupied the limitation as to time has no effect.

McMurray v. Capital Ins. Co., 87 Iowa, 453, 54 N. W. Rep. 354, 22 Ins. L. J. 204.

It should be noted that many of the old forms in terms provided that "if during the insurance the above-mentioned premises shall become vacant or unoccupied, *then and from thenceforth so long as the same shall continue vacant or unoccupied*, this policy shall cease and be of no force or effect."

Wheeler v. Phenix Ins. Co., 53 Mo. App. 446; Ætna Ins. Co. v. Meyers, 63 Ind. 238; Hartshorne v. Agricultural Ins. Co., 50 N. J. L. 427, 14 Atl. Rep. 615.

The change in the language is marked, but has not always been considered by the courts.

Some provided "if the premises hereby insured shall become vacant or unoccupied, or if the property insured be a mill or manufactory, shall cease to be operated and so remain for a period of more than fifteen days, without notice to the company and consent indorsed thereon, in every such case the policy shall be void," and it was held that the limitation of fifteen days applied to dwellings as well as to mills and factories.

Miaghan v. Hartford Ins. Co., 24 Hun, 58.

Others provided that "no liability shall exist under this policy for loss on any vacant and unoccupied building, unless a consent for such vacancy or unoccupancy be hereon indorsed," and it was held to apply to a vacancy occurring after issue of the policy as well as to vacancy at time of its issue.

Snyder v. Firemen's Fund Ins. Co., 78 Iowa, 146, 42 N. W. Rep. 630.

Others provided that "if the dwelling hereby insured shall cease to be occupied by the owner or occupant * * * policy shall be void," and it was held that the condition had no application to a risk taken upon an unoccupied dwelling.

Bennett v. Agricultural Ins. Co., 106 N. Y. 243, 12 N. E. Rep. 609.

Other old forms simply provided against vacancy or unoccupancy after issue of the policy. Carr v. Insurance Co., 60 N. H. 513; Alkan v. New Hampshire Ins. Co., 53 Wis. 136.

RULE 15.

Violation Voids Policy — Not Revived by Subsequent Occupation.

When the unoccupancy of the building insured is extended beyond the prescribed period of ten days, it renders the policy void, and the defense is not affected by the fact that the insured returned to the house before the fire, or because the risk may not have been increased by his absence;¹ when void by its terms on account of building being unoccupied for a longer period than that prescribed, the policy is not revived by a subsequent occupancy which continues until the fire.²

1. *Couch v. Farmers' Ins. Co.*, 64 App. Div. 367, 72 N. Y. Supp. 95; *Moore v. Phoenix Ins. Co.*, 62 N. H. 240.

2. *Hoover v. Mercantile Ins. Co.*, 93 Mo. App. 111, 69 S. W. Rep. 42. And see *German Ins. Co. v. Russell*, 65 Kans. 373, 69 Pac. Rep. 345.

See also this volume, "Increase of Hazard" and "Illuminating Gas and Prohibited Articles."

RULE 16.

Policy Suspended During Violation — Revived by Subsequent Occupation.

The company insures the property with the agreement and upon the condition that, being vacant at the time, or becoming vacant at any future time while the policy continues in force, such vacancy shall not continue longer than ten days; and if it does so continue longer than ten days, the policy shall then become void. If the loss occurs while the vacancy continues to exist, the company is not necessarily rendered liable because, knowing the fact, it has not meantime canceled or forfeited the policy. But if it does not exer-

cise its right in this respect, and the premises are again occupied, and are not vacant or unoccupied when the loss occurs, the liability on the policy would again attach.

Stephens v. Phoenix Assur. Co., 85 Ill. App. 671. And see *Detroit F. & M. Ins. Co. v. Chetlain*, 61 Ill. App. 450.

RULE 17.

Limitation as to Time — Authority of Agent.

A vacancy permit is limited as to time by its terms;¹ and when the company's agent is instructed to cancel the policy at its expiration, to knowledge of the insured, the agent has no authority to extend the time.²

1. *Maness v. Sun Ins. Co.*, 32 S. W. Rep. 326 (Tex. Civ. App.); *McLeary v. Orient Ins. Co.*, 32 S. W. Rep. 583 (Tex. Civ. App.).

2. *McLeary v. Orient Ins. Co.*, *supra*.

In *Phenix Ins. Co. v. Burton*, 39 S. W. Rep. 319 (Tex. Civ. App.) a dwelling was vacated during the evening of January 1st, and the fire occurred during the evening of January 10th, and it was held that the ten days allowed by the policy for vacancy had not expired.

RULE 18.

Not Necessary to Claim Risk Increased — Effect of Statute — Question of Fact — Evidence — Expert — Custom.

It is not necessary for the insurance company to sustain a defense of violation of the condition as to vacancy or occupancy to allege and prove that there was an increase of the risk;¹ unless required to do so by statute,² when the general situation and circumstances surrounding the property may be sufficient to establish a presumption of such an increase of risk; if there is no other evidence it sustains the burden

resting upon the company; if there is other evidence and the proof is equally balanced, then the company fails to sustain the burden of proof;³ the question of increase of risk is one to be determined ordinarily by a jury;⁴ the testimony of an insurance expert as to the effect upon rate of premium caused by owner vacating a dwelling is not admissible,⁵ though it may be proper and competent to prove a general custom of insurance companies not to take a risk on vacant or unoccupied property.⁶

1. *Doten v. Ætna Ins. Co.*, 77 Minn. 474, 80 N. W. Rep. 630; *Insurance Co. v. Long*, 51 Tex. 89. And see *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457.

2. *Jones v. Granite State Ins. Co.*, 90 Me. 40, 37 Atl. Rep. 326, 26 Ins. L. J. 611; *Moody v. Insurance Co.*, 52 Ohio St. 12, 38 N. E. Rep. 101, 24 Ins. L. J. 81, 26 L. R. A. 313; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Thayer v. Providence Ins. Co.*, 70 Me. 531.

3. *Jones v. Granite State Ins. Co.*, *supra*; *Lancy v. Home Ins. Co.*, 82 Me. 492, 20 Atl. Rep. 79, 19 Ins. L. J. 878; *White v. Phenix Ins. Co.*, 83 Me. 279, 22 Atl. Rep. 167, 20 Ins. L. J. 900.

4. *Moody v. Insurance Co.*, *supra*; *Thayer v. Providence Ins. Co.*, *supra*.

5. *Joyce v. Maine Ins. Co.*, 45 Me. 168.

6. *Kirby v. Phoenix Ins. Co.*, 13 Lea, 340 (Tenn.).

RULE 19.

Vacancy May be Claimed to Increase the Risk — Burden of Proof.

Vacancy may not be sufficient ground of forfeiture under the special condition in regard thereto, yet it may be claimed and established that such vacancy, as matter of fact, increased the risk; the burden of proof rests upon the insurance company.

Bryan v. Peabody Ins. Co., 8 W. Va. 605.

RULE 20.

Divisibility of Contract.

A violation of the condition as to vacancy or unoccupancy of a dwelling-house forfeits the entire policy, notwithstanding personal property therein is also covered;¹ but vacancy of one of several houses separately insured in the same policy does not prevent recovery for loss of the other; such a contract is severable.²

1. *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 33 Atl. Rep. 429, 25 Ins. L. J. 339, 30 L. R. A. 633.

2. *Speagle v. Dwelling-House Ins. Co.*, 97 Ky. 646, 31 S. W. Rep. 282, 24 Ins. L. J. 829; *Connecticut Ins. Co. v. Tilley*, 88 Va. 1024, 14 S. E. Rep. 851, 21 Ins. L. J. 558; prior appeal, 86 Va. 811.

In *Dohlantry v. Blue Mounds Ins. Co.*, 83 Wis. 181, 53 N. W. Rep. 448, the insurance was in several items on a house and other buildings on a farm, and it was held that the contract was not divisible when forfeiture was claimed on the ground that the house was vacant and unoccupied.

See also Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rules 26, 27.

RULE 21.

When Policy not Divisible.

Although a policy of insurance so written as to place separate valuations upon separate subjects of insurance will ordinarily be severable, it will not be so unless it can be said the risk intended to be excluded by a violated condition of the policy did not affect the item of property for the destruction of which a recovery is sought; thus when the insurance is itemized on house, barn, and other outbuildings on a farm, the

vacancy of the house voids the entire policy, which is not divisible in such a case.

Republic County Ins. Co. *v.* Johnson, Kans. , 76
Pac. Rep. 419, citing *Dohlantry v. Blue Mounds Ins. Co.*, 83
Wis. 181, 53 N. W. Rep. 448.

RULE 22.

Construction of "Occupied" and "Unoccupied" — Governed by Nature and Character of Building and Use — Knowledge of Company's Agent.

The words "occupied" and "unoccupied" are always to be construed with reference to the nature and character of the building, the purpose for which it is designed, and the uses contemplated by the parties as expressed in the contract. The occupancy of a dwelling, of a barn, and of a mill is in each case essentially different in its scope and character. The term "occupied" always implies a substantial and practical use of the building for the purposes for which it is intended and as contemplated by the policy;¹ and the knowledge of company's agent when policy issues may be relevant.²

1. *Hampton v. Hartford Ins. Co.*, 65 N. J. L. 265, 47 Atl. Rep. 433, 52 L. R. A. 344; *Central Montana Mines Co. v. Firemen's Fund Ins. Co.*, 92 Minn. 223, 99 N. W. Rep. 1120; *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165, 23 N. E. Rep. 482, 19 Ins. L. J. 289; *Hoover v. Mercantile Ins. Co.*, 93 Mo. App. 111, 69 S. W. Rep. 42; *East Texas Ins. Co. v. Kempner*, 12 Tex. Civ. App. 534, 34 S. W. Rep. 393; writ of error denied, 35 S. W. Rep. 1069 (the opinion in this case is both interesting and valuable as containing review of the cases); *Phoenix Ins. Co. v. Swann*, 41 S. W. Rep. 519 (Tex. Civ. App.); *Limburg v. German Ins. Co.*, 57 N. W. Rep. 626, 23 Ins. L. J. 321.

2. *Fritz v. Home Ins. Co.*, 78 Mich. 565, 44 N. W. Rep. 139, 19 Ins. L. J. 270.

RULE 23.

Construction as Affected by Description — Effect not Limited to Building.

The condition as to nonoccupancy must be construed to refer to the particular building specified and described as containing the property insured. Its character or nature as thus described governs the consideration of its occupancy, and if not occupied, the effect cannot be limited to the building itself, as the condition or clause was necessarily designed to affect the risk on the personal property insured.

Huber v. Manchester Assur. Co., 92 Hun, 223, 36 N. Y. Supp. 873.

RULE 24.

When Nature or Character of Occupation Changed.

When a schoolhouse insured for a period of years is subsequently changed into a dwelling and erected and used as such, it cannot be claimed that the nature or character of a schoolhouse continued to govern in a question of construction as to occupation in permitting a vacancy during the vacation season.

American Ins. Co. v. Foster, 92 Ill. 335.

RULE 25.

Meaning of Vacant or Unoccupied as Applied to a Dwelling.

Vacant or unoccupied as applied to a dwelling-house means habitation and without an occupant — without some person living in it. An actual use of the house as a place of abode or habitation is what is required. Such a house becomes vacant or unoccupied on removal of insured to another dwelling, notwith-

standing the fact that some of the employees of insured may occasionally sleep there; that some provisions are kept in the house, and members of insured's family daily visit the house for purpose of getting provisions therefrom;¹ occupancy of a dwelling means actual use of the building by human beings as their customary place of abode;² occupation of a dwelling is living in it;³ leaving furniture in the house is not occupation of it;⁴ a dwelling that is nobody's home cannot be said to be occupied,⁵ and the fact that several blankets remain in the house, which is visited twice every day, is not occupying it;⁶ though leaving furniture in the house may prevent a claim of vacancy.⁷

1. *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88, 30 L. R. A. 633, 33 Atl. Rep. 429, 25 Ins. L. J. 339; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. Rep. 285 (the opinion in this case contains an interesting and valuable review of the cases).

2. *Burner v. German-American Ins. Co.*, 45 S. W. Rep. 109, 27 Ins. L. J. 732, 103 Ky. 370; *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162. And see *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368, 57 N. E. Rep. 57; *Weidert v. State Ins. Co.*, 19 Oreg. 261, 24 Pac. Rep. 242, 19 Ins. L. J. 740; *Craig v. Springfield F. & M. Ins. Co.*, 34 Mo. App. 481; *Bonenfant v. American Ins. Co.*, 76 Mich. 653, 43 N. W. Rep. 682.

3. *Hoover v. Mercantile Ins. Co.*, 93 Mo. App. 111, 69 S. W. Rep. 42. And see *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N. W. Rep. 40; *Boardman v. North Waterloo Ins. Co.*, 31 Ont. 525; *Paine v. Agricultural Ins. Co.*, 5 T. & C. 619 (N. Y.); *Cook v. Continental Ins. Co.*, 70 Mo. 610; *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. L. 220; *Moore v. Phoenix Ins. Co.*, 64 N. H. 140.

4. *Home Ins. Co. v. Boyd*, *supra*; *Robinson v. Ætna Ins. Co.*, Ky. , 38 S. W. Rep. 693, 26 Ins. L. J. 823; *Corrigan v. Connecticut Ins. Co.*, 122 Mass. 298; *Huber v. Manchester Ins. Co.*, 92 Hun, 223, 36 N. Y. Supp. 873; *Barry v. Prescott Ins. Co.*, 35 Hun, 601; *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99;

Schuermann *v.* Dwelling-House Ins. Co., 161 Ill. 437, 43 N. E. Rep. 1093; American Ins. Co. *v.* Padfield, 78 Ill. 167; Agricultural Ins. Co. *v.* Frith, 21 Ill. App. 593; Richards *v.* Continental Ins. Co., 83 Mich. 508, 47 N. W. Rep. 350, 20 Ins. L. J. 366; Farmers' Ins. Co. *v.* Wells, 42 Ohio St. 519; Cook *v.* Continental Ins. Co., 70 Mo. 610.

5. Thomas *v.* Hartford Ins. Co., 53 S. W. Rep. 297 (Ky.); rehearing denied, 56 S. W. Rep. 264.

6. Stapleton *v.* Greenwich Ins. Co., 16 Misc. 483, 38 N. Y. Supp. 973; previous appeal to same effect, 15 Misc. 642, 37 N. Y. Supp. 347. And see Hartshorne *v.* Agricultural Ins. Co., 50 N. J. L. 427, 14 Atl. Rep. 615.

7. Norman *v.* Missouri Town Ins. Co., 74 Mo. App. 456; Omaha Ins. Co. *v.* Sinnott, 54 Nebr. 522, 74 N. W. Rep. 955; Herrman *v.* Merchants' Ins. Co., 81 N. Y. 184.

In Gibbs *v.* Continental Ins. Co., 13 Hun, 611, it was held that premises did not cease to be occupied when the insured slept in an adjoining house, leaving furniture and wearing apparel in the former, to which he was accustomed to return daily.

Some of the old forms provided that "if the premises became vacant" policy should be void, and it was held that the insurance on house and barn was not forfeited on proof that the house only became vacant.

Worley *v.* State Ins. Co., 91 Iowa, 150, 59 N. W. Rep. 16, 23 Ins. L. J. 580; McQueeney *v.* Phoenix Ins. Co., 52 Ark. 257, 12 S. W. Rep. 498. But see and compare Herrman *v.* Adriatic Ins. Co., 85 N. Y. 162.

Some provided that "if the insured premises became vacant by the removal of the owner or occupant, without immediate notice to the company and consent indorsed" the policy should become void, and it was held that the fact of vacancy did not work a forfeiture, but imposed a duty of giving notice upon the assured, and gave to the company the right of cancellation; that immediate notice must be construed to mean notice within a reasonable time in view of the circumstances and position of the parties.

Strunk *v.* Firemen's Ins. Co., 160 Pa. St. 345, 28 Atl. Rep. 779, 23 Ins. L. J. 475.

Others provided that "if the dwelling-house hereby insured shall cease to be occupied as such, the policy shall be void," and it was held that it ceased to be occupied on removal of tenant.

Bennett *v.* Agricultural Ins. Co., 50 Conn. 420, 12 Ins. L. J. 569.

Others provided that if the dwelling "shall cease to be occupied by the owner or occupant in the usual and ordinary manner

in which dwelling-houses are occupied as such, this policy shall be void until the written consent of the company at the home office is obtained," and it was held governed in construction and application by knowledge of the company's agent when the policy issued.

Vanderhoef v. Agricultural Ins. Co., 46 Hun, 328.

Some of the old forms provided that "unoccupied premises must be insured as such. Houses, barns, or other buildings insured as occupied premises, or on occupied premises the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company, and additional premium paid," and it was held that the insured was bound to give notice or pay or offer to pay additional premium.

Wustum v. City Ins. Co., 15 Wis. 138.

Others provided that the company should not be liable for any loss which may happen while the house "is left without an occupant or person actually residing therein."

Abrahams v. Agricultural Ins. Co., 40 Up. Can. Q. B. 175.

Others provided that "if the premises should become vacated by the removal of the owner or occupant without notice or consent" it should be void, and it was held that the insured was bound to give notice.

Sleeper v. Insurance Co., 56 N. H. 401, overruling *Chamberlain v. Insurance Co.*, 55 N. H. 249.

And in reasonable time.

Alston v. Insurance Co., 80 N. C. 326.

And see under similar condition requiring notice or consent, *Hill v. Equitable Ins. Co.*, 58 N. H. 82; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260, where it was held a question for the jury whether house had been vacated or not.

Others did not have any condition that vacancy should affect the insurance, and it was held that a temporary vacancy arising from a change in tenants was part of the risk, that it was sufficient to give notice, and that any question of increase of risk should be submitted to the jury.

Lockwood v. Middlesex Ins. Co., 47 Conn. 553.

Others provided that "if the premises shall become vacant or unoccupied and so remain with the knowledge of the assured without notice and consent in writing, "policy should be void."

Kelley v. Home Ins. Co., 5 Ins. L. J. 134 (U. S. Cir.).

RULE 26.

When House Unoccupied — Occupancy of House and Barn.

A house becomes and is unoccupied when vacated by a tenant and not occupied by a subsequent lessee;¹ Occupancy of a house implies its actual use as a dwelling-house; and of a barn, its use as ordinarily incident to a barn belonging to an occupied house; leaving farming implements in the house is not occupying it.²

1. *Stoltenberg v. Continental Ins. Co.*, 106 Iowa, 565, 76 N. W. Rep. 835.

2. *Martin v. Rochester German Ins. Co.*, 86 Hun, 35, 33 N. Y. Supp. 404. And see *Ashworth v. Builders' Ins. Co.*, 112 Mass. 422.

RULE 27.

Furniture Remaining in Dwelling Does not Constitute Occupancy or Living in It.

In case of a dwelling-house insured, the fact that the furniture remains in the house and that the assured's hired man makes frequent inspection of the household goods and has a general oversight of the building during the day, is not a full equivalent for the constant supervision involved in the occupancy of the premises as a customary place of abode and the actual presence in the building of those who are living in it and using it as a dwelling-house day and night;¹ a dwelling may be unoccupied, notwithstanding it is under the charge, supervision, and control of a third party living within same inclosure.²

1. *Hanscom v. Home Ins. Co.*, 90 Me. 333, 38 Atl. Rep. 324, 27 Ins. L. J. 19.

2. *Burner v. German-American Ins. Co.*, 103 Ky. 370, 45 S. W. Rep. 109, 27 Ins. L. J. 732. And see *Cook v. Continental*

Ins. Co., 70 Mo. 610; *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162; *Bonenfant v. American Ins. Co.*, 76 Mich. 653, 43 N. W. Rep. 682.

RULE 28.

House May not be Vacant and yet be Unoccupied.

While a building described as a dwelling containing insured property may not be vacant within the meaning of the policy, yet it may be unoccupied when the house is left by a tenant and ceases to be the customary place of abode, and the place of usual return and habitual stoppage.

Huber v. Manchester Assur. Co., 92 Hun, 223, 36 N. Y. Supp. 873. And see *Robinson v. Ætna Ins. Co.*, 38 S. W. Rep. 693, 18 Ky. L. Rep. 865, 26 Ins. L. J. 823.

RULE 29.

Occupation of a Dwelling — Temporary Absence — As Governed by Intention — Question of Fact.

While a dwelling-house must be habitually occupied by human beings as a place of living or residence, this does not prevent a temporary absence of the family, the furniture being left undisturbed in the house, and without any intention of permanent abandonment; under such circumstances the house does not become either vacant or unoccupied within meaning of the policy;¹ nor does habitual occupation of a dwelling necessarily mean constant occupation for all purposes; occupation may be to a limited extent both in reference to time and the nature of use, and the building still be and remain occupied;² if temporarily absent there must be intention to return within reason-

able time,³ and the question of such intent is proper to submit to a jury.⁴

1. *McMurray v. Capital Ins. Co.*, 87 Iowa, 453, 54 N. W. Rep. 354, 22 Ins. L. J. 204; *Home Ins. Co. v. Peyson*, 54 Nebr. 495, 74 N. W. Rep. 960; *Phoenix Ins. Co. v. Burton*, 39 S. W. Rep. 319 (Tex. Civ. App.); *Hill v. Ohio Ins. Co.*, 99 Mich. 466, 58 N. W. Rep. 359, and note pp. 466, 467; *Stupetski v. Transatlantic Ins. Co.*, 43 Mich. 373; *Shackelton v. Sun Fire Office*, 55 Mich. 288; *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N. W. Rep. 40; *Franklin Ins. Co. v. Kepler*, 95 Pa. St. 492; *Chandler v. Commerce Ins. Co.*, 88 Pa. St. 223; *Laselle v. Hoboken Ins. Co.*, 43 N. J. L. 468; *Springfield F. & M. Ins. Co. v. McLimans*, 28 Nebr. 846, 45 N. W. Rep. 171.

In *Home Ins. Co. v. Peyson*, the key was left with a neighbor, and in *Hill v. Ohio Ins. Co.* and *McMurray v. Capital Ins. Co.*, the property was left in charge and control of neighbors. In *Phoenix Ins. Co. v. Burton*, the family had been absent about sixty days, but had returned home before the fire.

2. *Moody v. Insurance Co.*, 52 Ohio St. 12, 38 N. E. Rep. 1011, 24 Ins. L. J. 81, 26 L. R. A. 313; *Western Assur. Co. v. Mason*, 5 Bradw. 141 (Ill.); *Rockford Ins. Co. v. Storig*, 31 Ill. App. 486, 19 Ins. L. J. 928.

3. *Thomas v. Hartford Ins. Co.*, 53 S. W. Rep. 297 (Ky.); rehearing denied, 56 S. W. Rep. 264.

4. *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64.

In *Moody v. Insurance Co.*, the plaintiff, who was the owner of the property, occupied the building as a dwelling-house when the policy was issued, and until the following March, when he rented it and placed his tenant in possession, who continued until the next spring. It was then let to another tenant, who moved his household goods into it; and those used by his married daughter and son-in-law for housekeeping were also placed in the house. The goods were such as were generally used by a family for housekeeping. Members of both families occupied the house to a limited extent. They slept there occasionally and did some work there, such as quilting. Some member of the family was there every day, sometimes only once, but often twice a day, and the tenant and his family so used the property, had full control of it, and watched and cared for it up to the time it was burned, though they usually slept and took their meals in another house nearby, which belonged to the tenant, and it was held that the evidence sustained finding by a jury that the building was occupied.

In *Rockford Ins. Co. v. Storig* the insured changed the use of his dwelling-house to a kitchen, dining-room, and storage place, used during the day in connection with an adjoining dwelling.

RULE 30.

Temporary Absence from Dwelling.

While a dwelling-house will not be regarded as occupied unless it is the home or dwelling place of some person, yet temporary absence, leaving the property for a short period unoccupied, will not be regarded as a breach of the condition, while absence for a fixed definite period, even with the intention to return and occupy the property, will violate the condition and render the policy void.

Couch v. Farmers' Ins. Co., 64 App. Div. 367, 72 N. Y. Supp. 95, citing *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165. And see *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. Rep. 383, 25 Ins. L. J. 610; *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162.

RULE 31.

Use of House for Partial Purposes of a Dwelling.

When a house built for a dwelling is used by the insured for cooking and general work in connection with an adjacent house where insured and his family sleep and eat, the former building is not vacant or unoccupied.

Dwelling-House Ins. Co. v. Osborn, 1 Kans. App. 197, 40 Pac. Rep. 1099, 24 Ins. L. J. 751.

RULE 32.

Cleaning of Dwelling not Occupation.

The cleaning of a dwelling preparatory to occupation is not occupation of it within meaning of the

policy;¹ though in connection with moving furniture therein, the house cannot be claimed to be vacant.²

1. *Thomas v. Hartford Ins. Co.*, 53 S. W. Rep. 297 (Ky.); rehearing denied, 56 S. W. Rep. 264. And see *Litch v. North British & M. Ins. Co.*, 136 Mass. 491, 13 Ins. L. J. 381; *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676, 39 N. W. Rep. 87.

2. *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472.

RULE 33.

Effect of Sleeping in the House.

If some one sleeps in the house and maintains a watch over the premises, though not having access to the entire building, or to all the rooms, it does not cease to be occupied;¹ a dwelling is not unoccupied if some one habitually sleeps in it.²

1. *Insurance Co. v. Hancock*, 106 Tenn. 513, 62 S. W. Rep. 145, 52 L. R. A. 665. And see also *German-American Ins. Co. v. Evants*, 94 Tex. 490, 62 S. W. Rep. 417; denying writ of error, 61 S. W. Rep. 536; *Hartford Ins. Co. v. Smith*, 3 Colo. 422; *Home Ins. Co. v. Wood*, 47 Kans. 521, 28 Pac. Rep. 167, 21 Ins. L. J. 179; *Traders' Ins. Co. v. Race*, 142 Ill. 338, 31 N. E. Rep. 392.

2. *Thieme v. Niagara Ins. Co.*, App. Div. , 91 N. Y. Supp. 499.

RULE 34.

Effect of Taking Meals in House and Use of Barn.

Merely temporarily taking meals in a house, and use of the barn for storing hay and tools, by a farmer and his servants, who live elsewhere, does not constitute occupancy of either.

Ashworth v. Builders' Ins. Co., 112 Mass. 422; *Moore v. Phoenix Ins. Co.*, 64 N. H. 140. And see *Fitzgerald v. Connecticut Ins. Co.*, 64 Wis. 463, 15 Ins. L. J. 277.

RULE 35.

**Ceasing to be Occupied for One of Several Purposes Described
Does not Void Policy.**

When a building is insured as an occupied dwelling and country store, ceasing to be occupied as a dwelling only does not void the policy.

Burlington Ins. Co. v. Brockway, 138 Ill. 644, 28 N. E. Rep. 799, 21 Ins. L. J. 624.

RULE 36.

**Dwelling Described as a Family Residence — Construction of the
Word "Family."**

A dwelling described and insured as "occupied as a family residence," does not cease to be occupied merely because it is occupied by only one person who has access to the entire building for purpose of caring for it;¹ no specific number is required to constitute a family; it is not necessary that they should eat in the house where they live.²

1. *Imperial Ins. Co. v. Kiernan*, 83 Ky. 468.

2. *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 432, 9 Ins. L. J. 428.

RULE 37.

When Tenement-House Vacant and Unoccupied.

A tenement-house is vacant and unoccupied when the tenants have moved out, although a few articles are left in one room by one of them;¹ a tenement block insured as a single building cannot be regarded as unoccupied with several of the tenements in actual use and occupation as residences.²

1. *Schuermann v. Dwelling-House Ins. Co.*, 161 Ill. 437, 43 N. E. Rep. 1093, *aff'g* 57 Ill. App. 200.

2. *Harrington v. Fitchburg Ins. Co.*, 124 Mass. 126.

RULE 38.

Construction of "Vacating."

Leaving property insured exposed to an approaching forest fire to remove and care for a sick wife, and returning as soon as possible, but unable to re-enter on account of the flames, does not constitute "vacating insured premises" within the meaning of those words as used in a policy.

Raymond v. Farmers' Ins. Co., 114 Mich. 386, 72 N. W. Rep. 254.

RULE 39.

Temporary Vacancy on Change of Tenants — Temporary Absence.

A temporary vacancy necessarily resulting while one tenant moves out and another moves into the building does not void the policy;¹ and so temporary absence of the insured and members of his family² or of a tenant,³ does not void the insurance.

1. *East Texas Ins. Co. v. Kempner*, 12 Tex. Civ. App. 534, 34 S. W. Rep. 393; writ of error denied, 35 S. W. Rep. 1069. And see previous appeal, 87 Tex. 229. *Contra*, *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420, 51 Conn. 504, 12 Ins. L. J. 569.

The difficulties suggested by the opinions of the courts in these cases would seem to be removed by the insertion in the standard forms of the express and positive limitation of ten days.

2. *Georgia Home Ins. Co. v. Brady*, 41 S. W. Rep. 513 (Tex. Civ. App.). And see Rule 29.

3. *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 32 S. W. Rep. 383, 25 Ins. L. J. 610.

A temporary absence by the occupant of a dwelling, leaving furniture and other household effects therein, with intention to return, does not make premises "vacant by the removal of the occupant."

Stone v. Granite State Ins. Co., 69 N. H. 438, 45 Atl. Rep. 235; *Johnson v. Norwalk Ins. Co.*, 175 Mass. 529, 56 N. E.

Rep. 569. And see *Johnson v. New York Bowery Ins. Co.*, 39 Hun, 410.

In *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. Rep. 525, there was an express stipulation that the house was to be "occupied all the year round" and it was held to be satisfied if permanent occupation was resumed so long before the fire that temporary absence appears to have no connection with the loss.

RULE 40.

Time Limitation as Affecting Construction of Old Forms.

Under old forms of policies the difficulty and difference of opinion among the judges as to whether a temporary vacancy owing to a change of tenants, and discussions as to whether any time should be allowed for the purpose, or a reasonable time according to the circumstances of each particular case,¹ would seem to be removed by the clear and specific limitation as to time inserted in the standard form.²

1. *East Texas Ins. Co. v. Kempner*, 87 Tex. 229, 27 S. W. Rep. 122, rev'g 25 S. W. Rep. 999, 23 Ins. L. J. 549; *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 133; *Worley v. State Ins. Co.*, 91 Iowa, 150, 59 N. W. Rep. 16, 23 Ins. L. J. 580; *Home Ins. Co. v. Mendenhall*, 64 Ill. App. 30, aff'd, 164 Ill. 458, 45 N. E. Rep. 1078; *Germania Ins. Co. v. Klewer*, 129 Ill. 599; *Niagara Ins. Co. v. Deda*, 19 Ill. App. 70; *Liverpool, L. & G. Ins. Co. v. Buckstaff*, 38 Nebr. 146, 56 N. W. Rep. 695; *German Ins. Co. v. Davis*, 40 Nebr. 700, 59 N. W. Rep. 698, 23 Ins. L. J. 768; *Union Ins. Co. v. McCullough*, Nebr. , 96 N. W. Rep. 79; *Omaha Ins. Co. v. Sinnott*, 54 Nebr. 522, 74 N. W. Rep. 955; *Norman v. Missouri Town Ins. Co.*, 74 Mo. App. 456. And see *Insurance Co. N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. Rep. 471; *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47, 21 Atl. Rep. 505; *Alston v. Insurance Co.*, 80 N. C. 326; *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420, 51 Conn. 504; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 24 N. E. Rep. 727.

2. See Rule 1; *Huber v. Manchester Ins. Co.*, 92 Hun, 223, 229, 36 N. Y. Supp. 873; *Roe v. Dwelling-House Ins. Co.*, 149 Pa. St. 94; *Ohio Farmers' Ins. Co. v. Vogel*, Ind. App. , 73 N. E. Rep. 612.

In *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, it was held that the insured might rely upon statement of the company's agent that policy would remain valid for thirty days after removal of a tenant.

RULE 41.

Occupancy of Building Used for Manufacturing Purposes.

To constitute occupancy of a building used for manufacturing purposes, there must be some practical use or employment of the property; thus when closed, and in hands of an agent to rent, it is unoccupied though occasionally visited by the agent and a watchman who resides next door;¹ it is not occupancy when tools or machinery remain in a shop, which is visited by the insured or representative to see if things are right.²

1. *Halpin v. Phoenix Ins. Co.*, 118 N. Y. 165, 23 N. E. Rep. 482, 19 Ins. L. J. 289. And see *Keith v. Quincy Ins. Co.*, 10 Allen, 228 (Mass.); *Halpin v. Aetna Ins. Co.*, 120 N. Y. 70, 23 N. E. Rep. 988, 19 Ins. L. J. 459; *Halpin v. Insurance Co. N. A.*, 120 N. Y. 73.

2. *Keith v. Quincy Ins. Co.*, *supra*; *Moore v. Phoenix Ins. Co.*, 64 N. H. 140.

RULE 42.

When Mill or Factory Vacant or Unoccupied.

A mere temporary cessation of the operation of the machinery in a mill, by reason of sickness, breakdown, low water, or other unavoidable cause, without any intention by the assured to cease operating it, does not constitute such vacancy or unoccupancy as to violate the condition in regard thereto;¹ and so when mill shuts down to repair machinery and a number of

employees continue in and about the mill engaged in usual work, the building does not cease to be occupied.²

1. *Ladd v. Ætna Ins. Co.*, 147 N. Y. 478, 25 Ins. L. J. 382, 42 N. E. Rep. 197, aff'g 70 Hun, 490, 24 N. Y. Supp. 384. And see *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; *Albion Lead Works v. Williamsburg City Ins Co.*, 2 Fed. Rep. 479, 9 Ins. L. J. 435.

2. *American Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131, 17 N. E. Rep. 771; *Brighton Mfg. Co. v. Reading Ins. Co.*, 33 Fed. Rep. 232, 234.

RULE 43.

Occupancy of Manufacturing Establishment Governed by Known Use and Character.

The condition as to vacancy or occupancy of a manufacturing establishment is rendered inoperative when from the known use and character of the business, continuous personal occupancy is not practicable nor contemplated by the insurer and the insured;¹ a manufacturing establishment insured as an entire plant is not vacant or unoccupied when a part is in use.²

1. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. Rep. 487.

2. *Central Montana Mines Co. v. Firemen's Fund Ins. Co.*, 92 Minn. 223, 99 N. W. Rep. 1120.

RULE 44.

When Flouring Mill not Vacant or Unoccupied.

A flouring mill is not vacant or unoccupied, although "shut down," the machinery remaining in place.

Bellevue Roller Mill Co. v. London & Lancashire Ins. Co., 4 Idaho, 307, 32 Pac. Rep. 196, 24 Ins. L. J. 331.

RULE 45.**When a Tannery is Occupied.**

A tannery is occupied if only occupied in part by a shoemaker, who uses the liquor left in the vats to tan some hides, and the finishing-room to complete his work.

Lebanon Ins. Co. v. Erb, 112 Pa. St. 149.

RULE 46.**Occupancy of a Boat.**

A boat left lying on the beach without any occupants and her furniture removed, and no use made of her, is unoccupied.

Reid v. Lancaster Ins. Co., 19 Hun, 284 (N. Y.).

RULE 47.**When a Storehouse Vacant and Unoccupied.**

When tenants, just before expiration of their term, abandon a building insured as a storehouse, leaving therein a small quantity of meat and a few empty barrels and boxes, the meat being sold and removed before the term ends, the building becomes vacant and unoccupied, notwithstanding the tenants retain the key and occasionally make a sale of the boxes or barrels.

Home Ins. Co. v. Scales, 71 Miss. 975, 15 So. Rep. 134, 23 Ins. L. J. 712.

RULE 48.**When a Store is Unoccupied.**

A store building insured, occupied by a tenant as a cigar store and manufactory, becomes unoccupied

when the tenant removes all his property except a counter, and nothing remains in the building but a few bottles of liquor, which the tenant gives permission to a neighboring saloon-keeper to store there.

Limburg v. German Fire Ins. Co., 90 Iowa, 709, 57 N. W. Rep. 626, 23 Ins. L. J. 321.

RULE 49.

When a Church is Vacant or Unoccupied.

If church buildings are kept for use for the purposes for which they are designed, and used as occasion presents, and as the convenience of the congregation may require, and there is no intent shown to abandon them for the purposes of their use by the temporary periods of nonuser, even though these periods may exceed the ten-day limit in the policy, such act is not *per se* a leaving of a church building vacant or unoccupied, within the forfeiture clause of the policy;¹ a church building does not become vacant because services may be discontinued, everything necessary for services remaining therein and sexton in charge.²

1. *Hampton v. Hartford Ins. Co.*, 65 N. J. L. 265, 47 Atl. Rep. 433, 52 L. R. A. 344.

2. *Caraher v. Royal Ins. Co.*, 63 Hun, 82, 17 N. Y. Supp. 858.

RULE 50.

When an Icehouse Vacant or Unoccupied — Question of Fact.

An icehouse is not, as a matter of law, vacant or unoccupied when, at time of the fire, there was yet a small quantity of ice in store not merchantable and all of the tools used in putting up ice were then stored

in the building; the fact that there was no merchantable ice in the building is not evidence that it was unoccupied or vacant; considering the fact that it was insured as an icehouse, it is proper to submit the question to the jury.

Des Moines Ice Co. v. Niagara Ins. Co., 99 Iowa, 193, 68 N. W. Rep. 600, 26 Ins. L. J. 378.

RULE 51.

When an Elevator Vacant or Unoccupied.

An elevator building insured as such, but not in operation at the time, and the company knowing that it would not be so used again, but was then and at the time of the fire used as a storehouse for the tools and machinery, preparatory to removal to a new location, is not vacant or unoccupied within the meaning of the policy; the removal of the engine does not change the character of the risk;¹ and so an elevator is not vacant or unoccupied if occasionally used, and men around it all the time, insured being there frequently, and leaving his papers there.²

1. *Clifton Coal Co. v. Scottish Union & Nat. Ins. Co.*, 102 Iowa, 300, 71 N. W. Rep. 433, 26 Ins. L. J. 1007.

2. *Williams v. North German Ins. Co.*, 24 Fed. Rep. 625, 14 Ins. L. J. 708.

RULE 52.

Occupancy of Saloon or Storehouse.

A building described as a saloon,¹ or a storehouse,² is not vacant or unoccupied, when in possession of the insured, who is getting the place in order and making the ordinary preparation for such purposes.

1. *Stensgaard v. National Ins. Co.*, 36 Minn. 181, 30 N. W. Rep. 468.

2. *Rockford Ins. Co. v. Wright*, 39 Ill. App. 574.

RULE 53.**Construction and Application of Rule 1 as Affecting Waiver or Estoppel.**

The provision (Rule 1) predicates the avoidance of the insurance upon either of two conditions: (a) the property being vacant and so remaining for ten days, or (b) its becoming vacant after being occupied and then remaining vacant for ten days. The former has reference to a state of things presently existing when the policy is issued and continuing thenceforth without interruption; the latter assumes a policy already existing and valid in its inception and refers to a vacancy commencing in the future. The condition contemplates the insurance of an unoccupied building for a limited period as prescribed, and hence knowledge of the company's agent as to unoccupancy when the policy issues does not operate as a waiver or estoppel when the building, having been occupied after policy issues, again becomes unoccupied, and so remains for more than ten days, until destroyed by fire.

Moore v. Niagara Ins. Co., 199 Pa. St. 49, 48 Atl. Rep. 869. And see *England v. Westchester Ins. Co.*, 81 Wis. 583, 51 N. W. Rep. 954.

RULE 54.**Time Limitation as Affecting Waiver.**

Under a specific time limitation as to nonoccupancy, mere knowledge by the company or its agent when policy issues that the property is vacant does not operate as a waiver.

Queen Ins. Co. v. Chadwick, 13 Tex. Civ. App. 318, 35 S. W. Rep. 26; *England v. Westchester Ins. Co.*, 81 Wis. 583, 51 N. W. Rep. 954; *Newmarket Savings Bank v. Royal Ins. Co.*, 150 Mass. 374, 23 N. E. Rep. 210, 19 Ins. L. J. 437. And see Rules 1, 40.

RULE 55.

**Waiver or Estoppel When Policy Issues — Duty of Agent —
Building in Process of Erection.**

Issue and delivery of the policy with knowledge by the company or its agent of existing facts as to vacancy or nonoccupancy, or that building will be unoccupied for more than the limited or prescribed period, operates as waiver or estoppel, preventing the company from claiming a forfeiture by reason of such facts;¹ when policy is issued on a building in process of erection, agent having knowledge of the vacancy, and no definite time being fixed within which completion and occupancy are to take place, it becomes the duty of the agent to notify the insured that the company would elect to cancel or consider the policy void, if, after a reasonable time, the premises should still remain unoccupied. Otherwise the policy continues in force.²

1. *Blass v. Agricultural Ins. Co.*, 18 App. Div. 481, 46 N. Y. Supp. 392, aff'd, 162 N. Y. 639, without opinion; *Short v. Home Ins. Co.*, 90 N. Y. 16; *Bean v. Atlanta Home Ins. Co.*, 34 Misc. 613, 70 N. Y. Supp. 581; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun, 328; *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 133; *Haight v. Continental Ins. Co.*, 92 N. Y. 51; *Queen Ins. Co. v. Straughan, Kans.*, 78 Pac. Rep. 447; *Hilton v. Phoenix Ins. Co.*, 92 Me. 272, 42 Atl. Rep. 412; *Prendergast v. Dwelling-House Ins. Co.*, 67 Mo. App. 426; *Hackett v. Philadelphia Underwriters*, 79 Mo. App. 16; *Chamberlain v. British American Ins. Co.*, 80 Mo. App. 589; *German Ins. Co. v. Frederick*, 57 Nebr. 538, 77 N. W. Rep. 1106; *Rochester Loan Co. v. Liberty Ins. Co.*, 44 Nebr. 537, 62 N. W. Rep. 877, 24 Ins. L. J. 665; *German Ins. Co. v. Penrod*, 35 Nebr. 273, 53 N. W. Rep. 74, 22 Ins. L. J. 41; *Queen Ins. Co. v. Kline*, Ky., 32 S. W. Rep. 214, 25 Ins. L. J. 236; *Commercial Union Assur. Co.*

v. Dunbar, 7 Tex. Civ. App. 418, 26 S. W. Rep. 628; *Devine v. Home Ins. Co.*, 32 Wis. 471; *St. Paul Ins. Co. v. Wells*, 89 Ill. 82; *Imperial Ins. Co. v. Shimer*, 96 Ill. 580; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; *Kimball v. Ætna Ins. Co.*, 9 Allen, 540 (Mass.); *Williams v. Niagara Ins. Co.*, 50 Iowa, 561; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88 (Va.).

2. *Milwaukee Mechanics Ins'. Co. v. Brown*, 3 Kans. App. 225, 44 Pac. Rep. 35.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 16, 20, and 21.

Many of the old forms provided that "if during the insurance the above-mentioned premises shall become vacant or unoccupied, then and from thenceforth so long as the same shall continue vacant or unoccupied this policy shall cease and be of no force or effect."

Wheeler v. Phoenix Ins. Co., 53 Mo. App. 446.

RULE 56.

Special Permit for Vacancy of Uncompleted Building.

When the company's agent, on issue of the policy upon a building not completed and unoccupied, indorses consent for thirty days' vacancy and at same time promising assured to indorse same permit every thirty days until the building is completed, and subsequently makes the indorsement on two occasions, but through accident or inadvertence omits to make the indorsement on expiration of the last period and property is destroyed more than ten days thereafter, it operates as a waiver of the condition.

Dupuy v. Delaware Ins. Co., 63 Fed. Rep. 680, 24 Ins. L. J. 161.

RULE 57.

Knowledge of Soliciting Agent.

The knowledge of a mere soliciting agent does not operate as an estoppel;¹ though it may when such an

agent is clothed by the insurance company with apparent authority and his acts are within scope of it, without notice to the insured of any limitation upon his authority,² or his status as agent is determined by a statute.³

1. *Hamburg-Bremen Ins. Co. v. Lewis*, 4 App. Cas. D. C. 66.

2. Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 9 and 23. And see this volume, "Agents."

3. *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 11 Ins. L. J. 126.

RULE 58.

Knowledge of Agent as Affecting Occupancy for Other Purposes Than as Described.

If company, through its agent, knows that building described as "occupied as a lodge room" is also, at time of issue of policy, used for other purposes, it cannot claim a forfeiture for nonoccupancy because the use as a lodge room ceases before the fire, the other uses continuing.

Driscoll v. German-American Ins. Co., 74 Hun, 153, 26 N. Y. Supp. 646.

RULE 59.

Effect of Knowledge as to Future Nonoccupancy.

When the building is occupied at time of the issue of the policy, the knowledge of the company as to future nonoccupancy will not operate as a waiver of the condition, provision being made for the cessation of occupancy.

Herrman v. Adriatic Ins. Co., 85 N. Y. 162; *Hartford Ins. Co. v. Davenport*, 37 Mich. 609. And see *Ætna Ins. Co. v. Burns*, 5 Ins. L. J. 69 (Ky.). And Rules 53, 54.

See also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 20.

RULE 60.

No Oral Waiver After Issue of Policy — May be Estoppel — Mere Knowledge no Estoppel.

When the only evidence of authority of the agent is that contained in the policy, or if the insured knows that the agent is without authority, he cannot, after issue of the policy, orally waive or dispense with the necessity of written consent to vacancy or nonoccupancy,¹ unless there is some element of estoppel in misleading the insured by an agent having authority;² or by an officer of the company;³ the agent's consent to an assignment of the policy, with notice or knowledge that the building is then unoccupied, does not operate as a waiver;⁴ there is no estoppel by mere knowledge of an agent.⁵

1. *Sutherland v. Eureka F. & M. Ins. Co.*, 110 Mich. 668, 68 N. W. Rep. 985; *Messelback v. Norman*, 122 N. Y. 578, 26 N. E. Rep. 34; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28, 31 N. E. Rep. 265, 21 Ins. L. J. 83; *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5; *Connecticut Ins. Co. v. Smith*, 10 Colo. App. 121, 51 Pac. Rep. 170, 26 Ins. L. J. 929; *Phoenix Ins. Co. v. Maxson*, 42 Ill. App. 164; *Sprague v. Western Home Ins. Co.*, 49 Mo. App. 423. And see *Harrison v. City Ins. Co.*, 9 Allen, 231 (Mass.); *Harrison v. Hartford Ins. Co.*, 30 Fed. Rep. 862.

2. *Home Ins. Co. v. Scales*, 71 Miss. 975, 15 So. Rep. 134, 23 Ins. L. J. 712; *Queen Ins. Co. v. Straughan*, Kans. , 78 Pac. Rep. 447. And see *Palmer v. St. Paul Ins. Co.*, 44 Wis. 201; *Rockford Ins. Co. v. Wright*, 39 Ill. App. 574.

3. *Adams v. Greenwich Ins. Co.*, 9 Hun, 45, aff'd, 70 N. Y. 166. And see *Lamberton v. Connecticut Ins. Co.*, 39 Minn. 129; *Wilkins v. State Ins. Co.*, 43 Minn. 177, 45 N. W. Rep. 1, 20 Ins. L. J. 478.

4. *Ranspach v. Teutonia Ins. Co.*, 109 Mich. 699, 67 N. W. Rep. 967, 25 Ins. L. J. 713; *Insurance Co. N. A. v. Garland*, 108 Ill. 220, 13 Ins. L. J. 427.

5. *Commercial Union Assur. Co. v. Dunbar*, 7 Tex. Civ. App. 418, 26 S. W. Rep. 628.

As to waiver, see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver." See also this volume, "Agents."

RULE 61.**Waiver or Estoppel After Issue of Policy.**

When the company's agent, on being notified of an intended vacancy after issue of the policy, informs the insured that the policy would not be canceled for vacancy without notice to him, and no such notice is given, it is proper to hold that the terms of the insurance contract have been changed or waived.

Wilson v. Commercial Union Assur. Co., 51 S. C. 540, 29 S. E. Rep. 245.

(The authority of this case is much affected by the brief but strong dissenting opinion of Chief Justice McIver, p. 549.)

And see Vol. 1, "Waiver," and this volume, "Agents."

RULE 62.**Estoppel by Agent — Written Permit Effective.**

When the assured leaves the policy in the possession of the company's agent who issued it, to have a vacancy permit attached, and is afterward informed by the agent that it is attached, the insured has a right to rely upon such statement;¹ and if a written permit be signed, it is not essential that it be attached to the policy to be effective.²

1. *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N. W. Rep. 40.

2. *Bennett v. Western Underwriters*, 130 Mich. 216, 89 N. W. Rep. 702.

RULE 63.**Receiving Premium After Fire.**

Receipt of and retention by the insurance company of the premium after a fire, with knowledge of the

facts as to vacancy or nonoccupancy, operates as a waiver or estoppel.

Frasier v. New Zealand Ins. Co., 39 Oreg. 342, 64 Pac. Rep. 814.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 45.

As to whether the omission by the company to cancel the policy, having knowledge of the facts, becomes evidence of waiver the courts do not agree.

That omission to cancel is *not* evidence of waiver, see *Sutherland v. Eureka F. & M. Ins. Co.*, 110 Mich. 668, 68 N. W. Rep. 985. That it may be, see *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, 25 S. E. Rep. 417.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 27, 28, and 30, note 2. And this volume, "Cancellation."

When the company, on being notified of vacancy, refuses to return the unearned premium and cancel the policy, it may become evidence of waiver.

Phoenix Ins. Co. v. Boyer, 1 Ind. App. 330, 27 N. E. Rep. 628.

There is an obvious distinction between a mere omission to cancel and a refusal to cancel on notice when required.

When the condition as to vacancy requires the insured to give notice to the company, the object of requiring notice is accomplished by receipt of such notice, and the company having received it, can terminate the insurance only by notice and payment of the unearned premium.

Wakefield v. Orient Ins. Co., 50 Wis. 532.

This case also points out a distinction, and, though sometimes cited, would not seem to be authority for any such proposition that in all cases mere omission to cancel of itself becomes evidence of waiver.

An alleged waiver by the company of the condition as to vacancy must be pleaded by the insured to be available, when required by local rules of practice.

Evans v. Queen Ins. Co., 5 Ind. App. 198, 31 N. E. Rep. 843.

Local rules of practice are beyond the scope of this work, but see and compare Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 60 and 61.

RULE 64.

Question of Law or Fact.

What is meant by the term "vacant" or "unoccupied" in a policy of insurance is a question of law, but whether the building is or was vacant or unoccupied, within the meaning of the policy, is a question of fact for determination by a jury;¹ unless the evidence is undisputed or uncontradicted, when it may be proper to dismiss the complaint,² or to direct the verdict.³

1. *Home Ins. Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. Rep. 1078, aff'g 64 Ill. App. 30; *Scheurmann v. Dwelling-House Ins. Co.*, 161 Ill. 437, 43 N. E. Rep. 1093; *Stone v. Granite Ins. Co.*, 69 N. H. 438, 45 Atl. Rep. 235; *Carr v. Insurance Cos.*, 60 N. H. 513; *Hampton v. Hartford Ins. Co.*, 65 N. J. L. 265, 47 Atl. Rep. 433, 52 L. R. A. 344; *Hunt v. State Ins. Co.*, 66 Nebr. 121, 92 N. W. Rep. 921; *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 133; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; *Wait v. Agricultural Ins. Co.*, 13 Hun, 371; *Caraher v. Royal Ins. Co.*, 63 Hun, 82; *Chandler v. Commerce Ins. Co.*, 88 Pa. St. 223; *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 432.

2. *Copp v. Home Ins. Co.*, 89 Hun, 611, 35 N. Y. Supp. 1105.

3. *Scheurmann v. Dwelling-House Ins. Co.*, *supra*.

RULE 65.

Question of Increased Hazard One of Fact — Change of Occupants Permitted.

The standard form permitting change of occupants without increased hazard, the question of increased hazard, if raised, is one of fact to be determined by a jury.

Driscoll v. German-American Ins. Co., 74 Hun, 153, 26 N. Y. Supp. 646.

CHAPTER SEVENTH.

Miscellaneous Provisions and other Subjects.

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TITLE I.

Cancellation.

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RULE 1.

As Imposed by Contract.

This policy shall be canceled at any time at the request of the insured; or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,
 Connecticut,
 Louisiana,
 Michigan,
 Missouri,

New Jersey,
 North Carolina,
 North Dakota,
 *Pennsylvania,
 Rhode Island.

* See note to "Concealment," Rule 1, page 2.

The standard form of policy prescribed in Wisconsin provides:

"This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. Unless during a time in which the hazard shall be increased solely by the act of God, and in such case and during such time of such increase of hazard, the company shall not cancel this policy except upon sixty days' notice of such cancellation without the consent of the assured. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

The standard form of policy prescribed in:

Maine,
Massachusetts,

Minnesota,
New Hampshire,

provides:

"This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rate for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks."

The standard form of policy prescribed in South Dakota provides:

"This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining after deducting the customary short rates for the time this policy shall have been in force. The company also reserves the right to cancel this policy as to all risks subsequent to the expiration of five days after the giving of such notice in writing to the insured, and to any mortgagee or trustee, to whom this policy is made payable, and tendering to the insured the ratable proportion of the premium. It shall be the duty of the insurer in order to avail himself of any provision in this policy rendering it void, to promptly

cancel the policy as provided herein upon having or obtaining notice or knowledge of the existence of any facts or circumstances which would, according to the terms of the policy, render it void; otherwise, it will be deemed to have waived such provision or provisions voiding the policy. Provided, that if the grounds for cancellation under the last clause shall be distinctly specified in the written notice, such cancellation may be effected upon twenty-four hours' notice to the insured; and actual notice to, or the knowledge of, any agent of the company as above mentioned* shall be deemed notice to, and knowledge of, the company."

In the States where no standard form of policy is prescribed, and other than those above named, the New York standard form is in general use.

RULE 2.

Condition as to Cancellation Strictly Construed — Burden of Proof.

Cancellation to be effective must be in strict accordance with the condition as prescribed in the policy,¹ or by a statute,² and the burden of establishing a cancellation after issue of the policy, when the undisputed evidence shows there was a completed contract, rests upon the insurance company.³

1. *Davison v. London & Lancashire Ins. Co.*, 189 Pa. St. 132, 42 Atl. Rep. 2, 28 Ins. L. J. 152; *Baldwin v. Pennsylvania Ins. Co.*, 206 Pa. St. 248, 55 Atl. Rep. 970; *Bradshaw v. Fire Ins. Co. of Phila.*, 89 Minn. 334, 94 N. W. Rep. 866. And see *Wicks Bros. v. Scottish Union & Nat. Ins. Co.*, 107 Wis. 606, 83 N. W. Rep. 781; *John R. Davis Lumber Co. v. Hartford Ins. Co.*, 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131; *Lattan v. Royal Ins. Co.*, 45 N. J. L. 453; *Ætna Ins. Co. v. Weissinger*, 91 Ind. 297; *Runkle v. Citizens' Ins. Co.*, 6 Fed. Rep. 143.

2. *Bank of Commerce v. British America Assur. Co.*, 18 Ont. 234; *Joshua Handy Machine Works v. American Ins. Co.*, 86 Cal. 248, 24 Pac. Rep. 1018.

3. *Phoenix Assur. Co. v. McArthor*, 116 Ala. 659, 22 So. Rep. 903.

* See chapter on "Agents," Rule 1, South Dakota form.

RULE 3.

Company's Right to Cancel Absolute—Not Dependent upon Motive, Reason, or Cause.

The option or right of an insurance company to cancel its policy does not depend upon any change in risk, or upon a knowledge of any fact acquired after the making of the insurance, or upon any change in the circumstances or condition of the insured or the insurers of the premises. The motive, or the sufficiency of the cause for exercise of the right, is not to be passed upon by any tribunal, but the will of the company and its election must stand for the reason of its action, and is cause for terminating the risk.

International Ins. Co. v. Franklin Ins. Co., 66 N. Y. 119; *Sun Fire Office v. Hart*, L. R. 14 App. Cas. 98 (Eng.).

RULE 4.

Notice — Form — Evidence.

Cancellation cannot be effective in absence of notice to the insured;¹ the form of notice is not prescribed, and may be given over the telephone;² but when premium has been paid the notice must be concurrent with tender or payment of the unearned premium.³ Cancellation is not evidenced by mere entry on the books of the company.⁴

1. *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, aff'd, 162 N. Y. 597, without opinion; *Yoshimi v. Fidelity Ins. Co.*, 99 App. Div. 69, 91 N. Y. Supp. 393; *John R. Davis Lumber Co. v. Hartford Ins. Co.*, 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131; *Cassville Roller Milling Co. v. Aetna Ins. Co.*, 105 Mo. App. 146, 79 S. W. Rep. 720; *Fowler Cycle Works v. Western Ins. Co.*, 111 Ill. App. 631; *Scott v. Sun Fire Office*,

133 Pa. St. 322. And see *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *London & Lancashire Ins. Co. v. Turnbull*, 86 Ky. 230; *Commercial Union Assur. Co. v. State*, 113 Ind. 331, 15 N. E. Rep. 518; *Carson v. German Ins. Co.*, 62 Iowa, 433, 17 N. W. Rep. 650, 19 Ins. L. J. 626.

2. *Manchester Ins. Co. v. Insurance Co. of Illinois*, 91 Ill. App. 609.

3. *Continental Ins. Co. v. Busby*, 3 Tex. Ct. App. Civ. Cas., § 101, 15 Ins. L. J. 736. And see Rule 8.

4. *King v. Enterprise Ins. Co.*, 45 Ind. 44.

The specific time limitation would seem to preclude any discussion as to reasonable time such as appears to have been involved, for instance, in *Chadbourne v. German-American Ins. Co.*, 24 Blatchf. 492, 31 Fed. Rep. 533, 16 Ins. L. J. 897.

RULE 5.

Meaning of Notice.

Notice means notice to the insured.¹ When the policy in terms provides for notice to insured or his representative, a party to whom the loss is payable may be regarded as the assured's representative, and notice to him may be sufficient notice of cancellation when the premium has not been paid.²

1. *London & Lancashire Ins. Co. v. Turnbull*, 86 Ky. 230, 5 S. W. Rep. 542.

2. *Mueller v. Southside Ins. Co.*, 87 Pa. St. 399. And see Vol. 1, *Fire Insurance as a Valid Contract*, "Parties to Fire Insurance Contract" and "Legal Representatives."

RULE 6.

Requisites of Notice — Expression of Intention Ineffectual — Use of Mail.

Notice to effect cancellation must be positive, distinct, and unequivocal; to effect a cancellation there must be an actual cancellation and not a mere intention to cancel; the assured must be informed not that

policy will be canceled, but that it is canceled. If evidence shows only a mere intention to cancel, it is not sufficient.¹ When notice of cancellation is sent by mail, its receipt must be shown to become operative; and the five days' notice runs from time of its receipt and not from time of mailing. There must be some act of cancellation after expiration of the time thus limited;² if policy is in the mail on its way to the company or its agent, and the unearned premium being unpaid and not tendered, and fire occurs, company is liable for the loss.³

1. *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611; *American Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. Rep. 373, 26 Ins. L. J. 3; *State Ins. Co. v. Hale*, Nebr., 95 N. W. Rep. 473; *Southern Ins. Co. v. Williams*, 62 Ark. 382, 35 S. W. Rep. 1101; *John R. Davis Lumber Co. v. Hartford Ins. Co.*, 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131; *Petersburg Ins. Co. v. Manhattan Ins. Co.*, 66 Ga. 446; *Newark Ins. Co. v. Sammons*, 110 Ill. 166. And see *Goit v. National Protection Ins. Co.*, 25 Barb. 189 (N. Y.).

2. *American Ins. Co. v. Brooks*, *supra*; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. Rep. 869.

3. *Southern Ins. Co. v. Williams*, *supra*.

RULE 7.

Act of Cancellation Should Precede Notice and Tender — When Takes Effect.

The act of cancellation should precede the notice and tender, but does not take effect until five days after the giving of the notice and the tender; an expression of a desire or intention to cancel is not effective as an act of cancellation.

Continental Ins. Co. v. Daniel, 78 S. W. Rep. 866 (Ky.).

RULE 8.

Unearned Premium Must be Returned or Tendered.

Notwithstanding the change in the language of the standard form, cancellation cannot be made effective by mere notice, when premium has been paid; in addition to the notice required, the insurance company is bound to seek out the insured and return or tender to him the whole amount of the unearned premium.

Tisdell v. New Hampshire Ins. Co., 155 N. Y. 163, 49 N. E. Rep. 664, 27 Ins. L. J. 385, 40 L. R. A. 765, aff'g 11 Misc. 20, and overruling *Waltheart v. Pennsylvania Ins. Co.*, 2 App. Div. 328, and *Backus v. Exchange Ins. Co.*, 26 App. Div. 91.

And see also as to the necessity of tender or payment of the unearned premium, *Chrisman & Sawyer Banking Co. v. Hartford Ins. Co.*, 75 Mo. App. 310; *Hartford Ins. Co. v. Cameron*, 18 Tex. Civ. App. 237, 45 S. W. Rep. 158; *Phoenix Assur. Co. v. Munger Cotton Mfg. Co.*, 92 Tex. 297, 49 S. W. Rep. 222, 28 Ins. L. J. 248; *Hartford Ins. Co. v. McKenzie*, 70 Ill. App. 615; *Peterson v. Hartford Ins. Co.*, 87 Ill. App. 567, rev'd, 187 Ill. 395, but on a question of practice; *Peoria F. & M. Ins. Co. v. Botto*, 47 Ill. 516; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *German Ins. Co. v. Rounds*, 35 Nebr. 752, 53 N. W. Rep. 660, 22 Ins. L. J. 48; *Marshall v. Reading Ins. Co.*, 78 Hun, 83, 29 N. Y. Supp. 334, aff'd, 149 N. Y. 617, without opinion; *Van Valkenburgh v. Lenox Ins. Co.*, 51 N. Y. 465; *Griffey v. New York Central Ins. Co.*, 100 N. Y. 417; *Hollingsworth v. Germania Ins. Co.*, 45 Ga. 294; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *White v. Connecticut Ins. Co.*, 120 Mass. 330; *Scott v. Sun Fire Office*, 133 Pa. St. 322, 19 Atl. Rep. 360; *Lattan v. Royal Ins. Co.*, 16 Vroom, 453 (N. J.); *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 26 Pac. Rep. 872, 20 Ins. L. J. 844, aff'g on rehearing, 25 Pac. Rep. 260, 20 Ins. L. J. 278; *Manlove v. Commercial Ins. Co.*, 47 Kans. 309, 27 Pac. Rep. 979, 21 Ins. L. J. 174. *Contra*, *Schwarzchild & Sulzberger Co. v. Phoenix Ins. Co.*, 115 Fed. Rep. 653, aff'd, 59 C. C. A. 572, 124 Fed. Rep. 52, refusing to follow *Tisdell v. New Hampshire Ins. Co.*, 155 N. Y. 163, 49 N. E. Rep. 664, and holding that it was not necessary to return or tender the unearned premium; that the condition as now worded required the return of the premium only upon the surrender of the policy by the insured to the company. This

case appears to have been decided in part upon findings of fact as to course of business and statement of account showing a sufficient amount of money to cover the unearned premium in the hands of an agent on an open account. See also *Insurance Co. v. Brecheisen*, 50 Ohio St. 542, 35 N. E. Rep. 53, 23 Ins. L. J. 56, where it was held that the return of the unearned premium was not a condition precedent to cancellation. Also *El Paso Reduction Co. v. Hartford Ins. Co.*, 121 Fed. Rep. 937.

RULE 9.

Cancellation Must be Pursuant to Terms of Policy.

There must be a notice of cancellation served on proper person, accompanied with tender or payment of the unearned premium. A tender and a demand for the surrender of the policy made for the purpose of a rescission, and for canceling it from the beginning and refused on that ground, forms no legitimate basis for claiming a cancellation pursuant to condition contained in the policy.

John R. Davis Lumber Co. v. Hartford Ins. Co., 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131.

RULE 10.

Effect of Accounts as Payment of Premium—Effect of Credit to Broker.

A transaction of account as between the company and its agent, without the knowledge or request of the assured, whereby the amount of premium is charged to the agent, and when policy is canceled the unearned portion credited to him, does not operate as a payment of the premium by the assured so as to require repayment or tender of the unearned portion to effect cancellation;¹ but the company may give

credit to insured's agent or broker in such a way as to operate in legal effect as a payment of the premium, preventing cancellation without payment or tender of the unearned premium,² but when the premium has not, in fact, been paid, a naked credit given to the insured's broker does not amount to payment so as to require tender or payment of the unearned premium.³

1. *Van Wert v. St. Paul F. & M. Ins. Co.*, 90 Hun, 465, 36 N. Y. Supp. 54. And see subsequent appeal, 8 App. Div. 107, 40 N. Y. Supp. 463.

2. *Bennett v. Maryland Ins. Co.*, 14 Blatchf. 422 (U. S. Cir.).

3. *Stone v. Franklin Ins. Co.*, 105 N. Y. 543, 12 N. E. Rep. 45. And see *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502. Also Rules 12, 13.

RULE 11.

Acceptance of Draft for Unearned Premium — Insufficient as Tender.

While a draft for amount of unearned premium may not ordinarily be sufficient as payment or tender to effect cancellation, it will have that effect, when so treated.

Lampasas Hotel Co. v. Home Ins. Co., 17 Tex. Civ. App. 615, 43 S. W. Rep. 1081.

RULE 12.

When Premium not Paid Tender not Required — Authority of Agent.

When the premium has not been paid in fact, and only credit has been given for the same to the insured or his broker, tender or payment of the unearned premium is not essential to effect cancellation,¹ which may be effected by notice to the insured or his agent,

and if either knows that company's agent is instructed to cancel, the latter has no power to continue policy in force.²

1. *Stone v. Franklin Ins. Co.*, 105 N. Y. 543, 12 N. E. Rep. 45. And see *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502; *Lipman v. Niagara Ins. Co.*, 121 N. Y. 454, 24 N. E. Rep. 699; *Little v. Eureka Ins. Co.*, 38 Ohio St. 110, 11 Ins. L. J. 417.

2. *Springfield Fire & Marine Ins. Co. v. McKinnon*, 59 Tex. 507, 12 Ins. L. J. 889. And see *Colonial Assur. Co. v. National Ins. Co.*, 110 Ill. App. 471.

RULE 13.

Premium Must Have Been Received by the Company.

It is not necessary to return the premium or unearned portion thereof to the insured in order to effect a cancellation, when the premium has never been received by the company and is retained by the broker or agent of the insured.

Mississippi Valley Ins. Co. v. Bermond, 45 Ill. App. 22.

Some of the old forms provided that "this company shall not be liable by virtue of this policy, or any renewal thereof, unless the premium therefor be actually paid to them or to their duly commissioned agent, within thirty days from date of the policy or renewal," and it was held that premium not being paid the company might cancel the policy after the expiration of the thirty days, without notice to the insured.

Redfield v. Paterson Ins. Co., 6 Abb. N. C. 456 (N. Y.).

In *Goodfellow v. Times & Beacon Ins. Co.*, 17 Up. Can. Q. B. 411, it was held that a binding receipt for insurance, subject to approval, could be terminated by notice at any time of rejection; but when such a receipt stated that it was made subject to all the conditions of printed form of policy, and such form required a notice of ten days and payment of the unearned premium, the company was bound to comply with such requirements to cancel the insurance.

RULE 14.

Effect of Acceptance of Note for Premium.

Acceptance of a note, which is not paid, does not amount to payment of the premium so as to require tender or payment of the unearned premium on cancellation;¹ if the company holds obligation of a third party, which it has accepted in payment of the premium, a surrender of it is essential to effect a termination of the risk.²

1. *Little v. Eureka Ins. Co.*, 38 Ohio St. 110.

2. *Chadbourn v. German-American Ins. Co.*, 24 Blatchf. 492, 31 Fed. Rep. 533, 16 Ins. L. J. 897.

In *Carlwitz v. Germania Ins. Co.*, 12 Ins. L. J. 127 (U. S. Cir.), the court held that the company could not cancel by notice when the company by its agent had agreed to accept payment of premium in trade or groceries.

And see this volume, "Premium."

RULE 15.

May be Effected by Mutual Consent — Waiver by Insured — Act of Partner.

Cancellation may be effected by mutual consent without regard to the terms of the policy;¹ notice of cancellation and refunding, or tender of unearned premium, may be waived by the assured,² who may agree to accept less than what would otherwise be due to him.³ It is not essential to cancellation that the policy be actually surrendered and marked canceled,⁴ and the insured may agree to a cancellation as of a certain date, though the policy may not actually be received by the company until afterward.⁵ The insured's acts may also operate as an estoppel against

him.⁶ A partner's consent to cancellation binds his firm.⁷

1. *Sea Ins. Co. v. Johnston*, 105 Fed. Rep. 286, 44 C. C. A. 477; *Wicks Bros. v. Scottish Union & Nat. Ins. Co.*, 107 Wis. 606, 83 N. W. Rep. 781; *Walters v. St. Joseph Ins. Co.*, 39 Wis. 489; *Kooistra v. Rockford Ins. Co.*, 122 Mich. 626, 81 N. W. Rep. 568; *Miller v. Firemen's Ins. Co.*, 54 W. Va. 344, 46 S. E. Rep. 181; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Kirby v. Phoenix Ins. Co.*, 13 Lea, 340 (Tenn.). And see *German Ins. Co. v. Davis*, Ark. , 12 S. W. Rep. 155; *King v. Aetna Ins. Co.*, 36 Mo. App. 128, 142; *Citizens' Ins. Co. v. Henderson*, 84 S. W. Rep. 580 (Ky.); *Hamburg-Bremen Ins. Co. v. Browning*, 102 Va. 890, 48 S. E. Rep. 2.

2. *Southern Ins. Co. v. Williams*, 62 Ark. 382, 35 S. W. Rep. 1101; *Bingham v. North American Ins. Co.*, 74 Wis. 498, 43 N. W. Rep. 494, 19 Ins. L. J. 897; *Springer v. Anglo Nevada Ins. Co.*, 11 N. Y. Supp. 533, 58 Hun, 601, memo. not reported. And see preceding cases under 1.

3. *Aetna Ins. Co. v. Weissinger*, 91 Ind. 297, 14 Ins. L. J. 151.

4. *Sammons v. Newark Ins. Co.*, 110 Ill. 166, 13 Ins. L. J. 837. And see *Bingham v. North American Ins. Co.*, 74 Wis. 498, 43 N. W. Rep. 494, 19 Ins. L. J. 897.

5. *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.

6. *Hopkins v. Phoenix Ins. Co.*, 78 Iowa, 344, 43 N. W. Rep. 197, 19 Ins. L. J. 90.

7. *Bingham v. North American Ins. Co.*, 74 Wis. 498, 43 N. W. Rep. 494, 19 Ins. L. J. 897.

RULE 16.

Cancellation by Voluntary Surrender and Delivery — When Notice not Required — Question of Fact.

Cancellation of the policy is effected by its voluntary surrender and delivery to the insurance company or its agent, without reserve, the premium not having been paid. The five days' notice is not required in such a case, or the clause requiring it is inoperative. The five days' notice of cancellation has reference to a policy in force either by actual payment or a con-

tinued credit for it; such credit may be terminated at any time, and company's act in taking back the policy is explicit notice to assured of such termination;¹ if the policy is once surrendered, and the surrender accepted, it is canceled, and the taking of it back by the insured cannot revive the contract or make a new one, though the question of the surrender may be one of fact to be determined by a jury.²

1. *Van Wert v. St. Paul F. & M. Ins. Co.*, 8 App. Div. 107, 40 N. Y. Supp. 463. And see previous appeal, 90 Hun, 465, 36 N. Y. Supp. 54.

2. *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598.

RULE 17.

Surrender of Policy upon Condition — Authority of Agent.

Cancellation is not effected by surrender and delivery of the policy by the assured to company's agent, for that purpose, when such surrender and delivery are made upon conditions as to replacing with other insurance not performed by the agent,¹ but such a surrender may be an absolute cancellation when the agent has no authority to make such a condition.²

1. *Hickey v. Hartford Ins. Co.*, 15 App. Div. 224, 44 N. Y. Supp. 191, and see previous appeal, 92 Hun, 192, 36 N. Y. Supp. 329; *Edwards v. Sun Ins. Co.*, 101 Mo. App. 45, 73 S. W. Rep. 886. And see *Wilkins v. Insurance Co.*, 30 Ohio St. 317; *Queen Ins. Co. v. Leonard*, 2 Ohio Dec. 122, 9 Ohio C. C. 46; *Ætna Ins. Co. v. Rosenberg*, 62 Ark. 507, 36 S. W. Rep. 908. And see *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 432, 9 Ins. L. J. 428; *Caldwell v. Stadacona Ins. Co.*, 11 Duval, 212 (Can. Sup.).

2. *Miller v. Firemen's Ins. Co.*, 54 W. Va. 344, 46 S. E. Rep. 181 (there is an able dissenting opinion in this case). And see this volume, "Agents."

RULE 18.

Effect of Promise by Insured.

A promise by the insured to bring the policy to the company's office to be canceled, when he is to be paid or to receive the return or unearned premium, is not a valid agreement to deem the policy canceled without return of the premium, nor is it a waiver of the condition upon which rests the right of cancellation.

Hathorn v. Germania Ins. Co., 55 Barb. 28 (N. Y.).

RULE 19.

Insured Must be Capable of Understanding His Acts — Question of Fact.

If cancellation is claimed to result from the voluntary surrender of the policy by the insured with that intent, the insured must understand his act; if he is incapable of understanding, by reason of mental disease, it may not be effective. The question is proper to be submitted to a jury.

McClosky v. Springfield F. & M. Ins. Co., 76 Vt. 151, 56 Atl. Rep. 662.

RULE 20.

Computation of Time.

The stipulation in an insurance policy, providing that the risk begins and terminates at noon of the days named, is limited as thus provided, and has no application to the period of five days required for notice of cancellation; in latter case, the clause is governed by the general rule of excluding the first day, and counting the days as legal days beginning and ending at midnight.

Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. Rep. 138, 28 Ins. L. J. 223.

RULE 21.

Company Cannot Reduce Insurance Without Consent of Insured.

The insurance company cannot reduce the amount of its policy, without the consent of the insured.

McLean v. American Ins. Co., 122 Iowa, 355, 98 N. W. Rep. 146.

RULE 22.

Cancellation upon Request of Insured — Unearned Premium.

When requested by the insured, cancellation must be made or effected by the insurance company, but there is no obligation to repay an unearned premium to an assignee of the insured in absence of such request, nor upon a void policy.¹ When a statute makes it the duty of an insurance company to cancel its policy upon request of the insured, it has reference to a valid and subsisting contract; if policy is voided by violation of its conditions, the insured cannot claim the return of the unearned premium.²

1. *Colby v. Cedar Rapids Ins. Co.*, 66 Iowa, 577, 14 Ins. L. J. 698.

2. *Farmers' Ins. Co. v. Home Ins. Co.*, 54 Nebr. 740, 74 N. W. Rep. 1101.

And see also, under Nebraska statute, *State Ins. Co. v. Farmers' Ins. Co.*, 65 Nebr. 34, 90 N. W. Rep. 997; *Farmers' Ins. Co. v. Phoenix Ins. Co.*, 65 Nebr. 14, 90 N. W. Rep. 1000.

See also, under the Iowa statute, *Born v. Home Ins. Co.*, Iowa, , 81 N. W. Rep. 676.

RULE 23.

Request for Cancellation by Insured.

A request for cancellation of an insurance policy, and claim of unearned premium, takes effect from

the time of its receipt by the insurer, with tender of the policy.

Farmers' Ins. Co. v. Phoenix Ins. Co., 65 Nebr. 14, 90 N. W. Rep. 1000, rev'd on rehearing for purpose of an accounting, but above rule expressly reaffirmed, 95 N. W. Rep. 3.

RULE 24.

Insured's Right Does not Depend upon Notice — Duty of Insured if Policy not Satisfactory.

The insured's right to have policy canceled on his request does not depend upon notice. In the absence of any stipulation in the contract requiring such notice to be given, the reasonable construction of the insured's contractual right to terminate the policy is that he may do so by delivering it to an agent of the company, with a request that it be canceled, or with notice that he surrenders it for cancellation, or with any direct manifestation of his intent to terminate it at that time. By such action the policy is terminated;¹ if the policy is not acceptable to the insured, he should at once return it for cancellation.²

1. *Insurance Co. v. People's Ins. Co.*, 68 N. H. 51, 44 Atl. Rep. 82, 28 Ins. L. J. 931; *Crown Point Iron Co. v. Ætna Ins. Co.*, 127 N. Y. 608, 28 N. E. Rep. 653, 21 Ins. L. J. 31, 14 L. R. A. 147.

2. *Clem v. German Ins. Co.*, 29 Mo. App. 666.

RULE 25.

Cancellation by Mail.

When the insured incloses his policy for cancellation in a letter and sends same by the mail, the company continues liable while the letter remains in the mail, and cancellation is not effected until it is actually

received by the insurance company or its representative.

Crown Point Iron Co. v. Aetna Ins. Co., 127 N. Y. 608, 28 N. E. Rep. 653, 21 Ins. L. J. 31, 14 L. R. A. 147.

RULE 26.

Fire Occurring Before Expiration of Notice.

If fire occurs before expiration of the five days' notice of cancellation required, policy remains in force, though it may have been sent by mail to the agent for purpose of cancellation and procuring other insurance. There must be evidence of intention to consent to immediate cancellation.

Wicks Bros. v. Scottish Union & Nat. Ins. Co., 107 Wis. 606, 83 N. W. Rep. 781.

RULE 27.

Party or Mortgagee to Whom Loss Payable Cannot Consent — Effect of Mortgage Clause.

A party or mortgagee to whom the loss of the insured is made payable, or holding policy as security, cannot consent to a cancellation of the policy, in absence of consent or authority from the insured;¹ but when a mortgagee clause is added or attached, containing a provision as to cancellation, both the insured and mortgagee are bound by its terms.²

1. *Matter of Moore*, 6 Daly, 541 (N. Y.); *Edwards v. Sun Ins. Co.*, 101 Mo. App. 45, 73 S. W. Rep. 886; *Marrin v. Stadacona Ins. Co.*, 43 Up. Can. 556, 4 Tupper, 330; *Peterson v. Hartford Ins. Co.*, 87 Ill. App. 567, rev'd, 187 Ill. 395, upon a question of practice.

2. *Burris v. Phoenix Ins. Co.*, 65 Mo. App. 157.

The mortgagee clause varies in language but usually requires notice of cancellation to both the insured and the mortgagee.

For forms see Vol. 1, Fire Insurance as a Valid Contract, chapter 12. See also same volume, title "Mortgagor and Mortgagee."

It has been held or intimated that notice of cancellation should also be given to a mortgagee to whom the loss is payable, though whether or not there was a mortgagee clause does not appear in the report.

Lattan v. Royal Ins. Co., 45 N. J. L. 453; *East Texas Fire Ins. Co. v. Flippen*, 4 Tex. Civ. App. 576, 23 S. W. Rep. 550, 23 Ins. L. J. 219.

In *Lattan v. Royal Ins. Co.* the court says: "So far as the interest of the mortgagee is concerned, cancellation without notice to him would be unavailing."

There is a material distinction in the two classes of cases: (1) when the loss is merely made payable to the mortgagee; (2) where in addition to making the loss payable to him there is inserted and made a part of the contract a mortgagee clause.

In the former case the mortgagee is a mere appointee to receive the loss sustained by the insured, in the latter there is an independent contract protecting the interest of the mortgagee.

See Rule 1 and compare difference in forms. And see also and compare the various rules in Vol. 1, Fire Insurance as a Valid Contract, under "Mortgagor and Mortgagee," Rules 1, 2, 10, and 20.

In *Shawnee Ins. Co. v. Bayha*, 8 Kans. App. 169, 55 Pac. Rep. 474, it was held that as between the insurance company and (assured) owner and mortgagor, it is not essential to notify the mortgagee to whom loss is made payable with mortgagee clause, of the cancellation of a prior policy containing same provisions.

And in *Sun Ins. Co. v. Greenville Building & Loan Assoc.*, 58 N. J. L. 367, 33 Atl. Rep. 962, 25 Ins. L. J. 657, it was held that when the insurance company upon the trial in suit brought by the mortgagee, to whom the loss was made payable, gives evidence that notice was given to the mortgagee of cancellation, and that the mortgagee before the occurrence of the fire agreed that it should be canceled and promised to surrender it to the insurance company, it is error to direct a verdict for the plaintiff, as the question of fact should be submitted to the jury.

RULE 28.

Liability of Insured for Earned Premium.

The insured has no right to avoid the payment of the earned premium, upon a plea that the policy was

void, without having demanded a return of the premium, and returning or offering to return the policy.

St. Paul F. & M. Ins. Co. v. Neidecken, 6 Dak. 494, 43 N. W. Rep. 696, 19 Ins. L. J. 369.

RULE 29.

Policy Cannot be Canceled When Property Exposed to Fire.

An insurance company cannot exercise its option of cancellation of a policy when the property covered thereby is exposed to the danger or risk of an imminent or pending fire.

Home Ins. Co. v. Heek, 65 Ill. 111; *Lipman v. Niagara Ins. Co.*, 121 N. Y. 454, 24 N. E. Rep. 699, 19 Ins. L. J. 985.

RULE 30.

Presumption as to Short Rate.

If there is no evidence as to "short rate," it will be presumed to be the same proportionately as the long one.

Home Ins. Co. v. Burnett, 26 Mo. App. 175.

Some of the old forms provided for retention of the "customary short rate together with the expenses of writing the risk," and it was held that "expenses of writing the risk" included commissions paid to the agent.

State Ins. Co. v. Horner, 14 Colo. 391, 23 Pac. Rep. 788, 19 Ins. L. J. 837.

RULE 31.

Mutual Mistake.

Cancellation of a policy of insurance, both parties being at the time in ignorance of a loss thereunder, is such a mutual mistake as to warrant relief in equity

by rescinding the same;¹ and so the insured will be relieved from the consequences of a mistake in surrendering a policy to the company upon which he has paid the premium, instead of another which he intended to surrender, and on which the premium has not been paid.²

1. *Duncan v. N. Y. Mutual Ins. Co.*, 18 N. Y. Supp. 863, 46 N. Y. St. Rep. 241, aff'g 16 N. Y. Supp. 842.

2. *Von Wien v. Scottish Union & Nat. Ins. Co.*, 118 N. Y. 94, 23 N. E. Rep. 123.

And as to relief when policy canceled by mistake, see also *Marsh v. Northwestern Nat. Ins. Co.*, 3 Biss. 351 (U. S. Cir.).

RULE 32.

Agent Cannot Delegate Authority.

If an agent has the power or authority to cancel a policy, such power cannot be delegated by him to another person; but such person may deliver the notice and pay or tender the unearned or return premium.

Runkle v. Citizens' Ins. Co., 6 Fed. Rep. 143.

RULE 33.

Authority of Insured's Agent or Broker — Custom — Evidence.

The authority of an agent or broker to procure insurance terminates when such insurance is procured and the policy or policies are delivered to his principal, and the agent or broker has no power thereafter to consent to a cancellation of the policy or insurance, or to receive notice of the same, and consent to substitution of other companies or policies;¹ the authority of an agent of the insured for such purposes

must be established,² and cannot be established by custom, unless uniform and known to the insured.³ And when the policy in terms provides that notice shall be given to the insured, custom cannot supersede the express provision of the contract.⁴ The authority of insured's bookkeeper or agent to receive notice of cancellation may become, on proper evidence, a question of fact to be determined by a jury.⁵

1. *Martin v. Palatine Ins. Co.*, 106 Tenn. 523, 61 S. W. Rep. 1024; *Grace v. American Central Ins. Co.*, 109 U. S. 278; *Merchants' Ins. Co. v. Shults*, Kans. App. , 57 Pac. Rep. 306; *Kooistra v. Rockford Ins. Co.*, 122 Mich. 626, 81 N. W. Rep. 568; *Snedicor v. Citizens' Ins. Co.*, 106 Mich. 83, 64 N. W. Rep. 35; *Healy v. Insurance Co. Pa.*, 50 App. Div. 327, 63 N. Y. Supp. 1055; *Van Valkenburgh v. Lenox Ins. Co.*, 51 N. Y. 465; *Von Wien v. Scottish Union Ins. Co.*, 118 N. Y. 94; *Hermann v. Niagara Ins. Co.*, 100 N. Y. 411; *Johnson v. North British & M. Ins. Co.*, 66 Ohio St. 6, 63 N. E. Rep. 610; *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624, 68 S. W. Rep. 653; *Wilson v. Hartford Ins. Co.*, 17 App. D. C. 14; *John R. Davis Lumber Co. v. Hartford Ins. Co.*, 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131; *Body v. Hartford Ins. Co.*, 63 Wis. 157; *Wight v. Royal Ins. Co.*, 53 Fed. Rep. 340; *East Texas Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. Rep. 572; *Quong Tue Sing v. Anglo Nevada Ins. Co.*, 86 Cal. 566, 25 Pac. Rep. 58, 20 Ins. L. J. 322, 10 L. R. A. 144; *North American Ins. Co. v. Forcheimer*, 86 Ala. 541, 5 So. Rep. 870; *Niagara Ins. Co. v. Raden*, 87 Ala. 311, 5 So. Rep. 876; *Mutual Assur. Soc. v. Scottish Union & Nat. Ins. Co.*, 84 Va. 116; *Rothschild v. American Central Ins. Co.*, 74 Mo. 41; *McCartney v. State Ins. Co.*, 45 Mo. App. 373; *Edwards v. Home Ins. Co.*, 100 Mo. App. 695, 73 S. W. Rep. 881; *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113; *Broadwater v. Lion Ins. Co.*, 34 Minn. 465; *Wilson v. New Hampshire Ins. Co.*, 140 Mass. 210; *Bennett v. City Ins. Co.*, 115 Mass. 241.

2. *British America Assur. Co. v. Cooper*, 26 Colo. 452, 58 Pac. Rep. 592; *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273, 32 So. Rep. 887. And see preceding cases under 1.

3. *Hodge v. Security Ins. Co.*, 33 Hun, 583 (N. Y.); *Hermann v. Niagara Ins. Co.*, 100 N. Y. 411; *Adams v. Manu-*

facturers & Builders' Ins. Co., 17 Fed. Rep. 630, 12 Ins. L. J. 787.

4. *Mutual Assur. Soc. v. Scottish Union & Nat. Ins. Co.*, 84 Va. 116, 4 S. E. Rep. 178. And see *Lipman v. Niagara Ins. Co.*, 121 N. Y. 454, 24 N. E. Rep. 699, 19 Ins. L. J. 985; *Hermann v. Niagara Ins. Co.*, 100 N. Y. 415.

5. *Edwards v. Sun Ins. Co.*, 101 Mo. App. 45, 73 S. W. Rep. 886.

RULE 34.

Insured's Agent or Broker Having General Authority as to Insurance.

If a broker or agent has general authority from his principal not only to obtain, but to maintain, insurance, placing and replacing same according to circumstances in his discretion, having general charge of his principal's insurance, then he may be the agent of the insured for purposes of cancellation and substitution;¹ and the five days' notice required may be dispensed with or waived by him;² the authority of such an agent or broker becomes a question of fact;³ a broker is an agent of the insured, and an insurance company is justified in regarding him as clothed with full authority to act for the insured in procuring, modifying, or canceling a policy, and his acts in respect thereto are the same as if done by his principal.⁴

1. *Snyder v. Commercial Ins. Co.*, 67 N. J. L. 7, 50 Atl. Rep. 509; *Ikeller v. Hartford Ins. Co.*, 24 Misc. 136, 53 N. Y. Supp. 323; *Stone v. Franklin Ins. Co.*, 105 N. Y. 543, 12 N. E. Rep. 45; *Armour v. Transatlantic Ins. Co.*, 15 Jones & Sp. 352, aff'd, 90 N. Y. 450; *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611; *Trundle v. Providence-Washington Ins. Co.*, 54 Mo. App. 188; *Edwards v. Home Ins. Co.*, 100 Mo. App. 695, 73 S. W. Rep. 881; *Buick v. Mechanics' Ins. Co.*, 103 Mich. 75, 61 N. W. Rep. 337, 24 Ins. L. J. 375; *Schauer v. Queen Ins. Co.*, 88

Wis. 561; *Kerr v. Milwaukee Mechanics' Ins. Co.*, 117 Fed. Rep. 442, 54 C. C. A. 616; *White v. Insurance Co. N. Y.*, 93 Fed. Rep. 161; *Dickert v. Farmers' Ins. Assoc.*, 52 S. C. 412, 29 S. E. Rep. 786.

2. *Buick v. Mechanics' Ins. Co.*, 103 Mich. 75, 61 N. W. Rep. 337, 24 Ins. L. J. 375; *Schauer v. Queen Ins. Co.*, 88 Wis. 561; *Ikeller v. Hartford Ins. Co.*, 24 Misc. 136, 53 N. Y. Supp. 323.

3. *Snyder v. Commercial Ins. Co.*, 67 N. J. L. 7, 50 Atl. Rep. 509; *Dickert v. Farmers' Ins. Co.*, 52 S. C. 412, 29 S. E. Rep. 786; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252. And see *Edwards v. Sun Ins. Co.*, 101 Mo. App. 45, 73 S. W. Rep. 886.

4. *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85.

RULE 35.

Authority of Broker to Surrender and Cancel — Evidence — Waiver — Liability for Earned Premium.

If the insured returns a policy to the broker through whom he obtained it, upon request for its cancellation by the company, the broker has special authority to surrender and cancel the policy;¹ the insured may waive notice and consent to cancellation by the surrender of the policy without such notice; leaving policy in the hands of his agent for such purpose clothes him with sufficient authority to surrender in cancellation, and the insured is bound by his act;² the cancellation is effective without regard to instructions given by the insured to the broker, not disclosed to the company's agent, to the effect that he could deliver up the policy for cancellation, but not until he should be insured in some other good company to the same amount.³ When the insured returns policy for cancellation through his broker, he is liable for the premium at short rate to time of surrender.⁴

1. *Parker & Young Mfg. Co. v. Exchange Ins. Co.*, 166 Mass. 484, 44 N. E. Rep. 614; *Faulkner v. Manchester Assur. Co.*, 171 Mass. 349, 50 N. E. Rep. 529.

2. *Kooistra v. Rockford Ins. Co.*, 122 Mich. 626, 81 N. W. Rep. 568. And see *Walters v. St. Joseph Ins. Co.*, 39 Wis. 489; *Birnstein v. Stuyvesant Ins. Co.*, 83 App. Div. 436, 82 N. Y. Supp. 140, rev'g 39 Misc. 808, 81 N. Y. Supp. 306.

3. *Faulkner v. Manchester Assur. Co.*, *supra*.

4. *Manhattan Ins. Co. v. Harlem River Lumber Co.*, 26 Misc. 394, 56 N. Y. Supp. 186.

Some of the old forms provided in terms "this insurance may be determined at any time * * * by the company on giving notice to that effect to the assured, or to the person who may have procured this insurance to be taken by the company."

Lipman v. Niagara Ins. Co., 121 N. Y. 454, 24 N. E. Rep. 699, 19 Ins. L. J. 985, and the court says, p. 460, that "the special language of the above condition was inserted to meet the objection pointed out in *Hermann v. Niagara Ins. Co.*, 100 N. Y. 415.

Others provided that "any broker or other person than the insured who procured the policy shall be assumed to be the agent of the insured, and not of the company, in any transaction relating to the insurance," and under both forms it was held notice of cancellation might be given to the broker.

Karelsen v. Sun Fire Office, 122 N. Y. 545, 25 N. E. Rep. 921, 20 Ins. L. J. 44. And see *Young v. Newark Ins. Co.*, 59 Conn. 41, 19 Ins. L. J. 423. And compare *White v. Connecticut Ins. Co.*, 120 Mass. 330.

Under such form it was held that an insurance agent in attempting substitution of one policy for another could not give notice to himself of cancellation as the person who procured the insurance.

Niagara Ins. Co. v. Raden, 87 Ala. 311.

RULE 36.

Limitation as to Authority of Broker.

While possession of a policy by a broker confers or may be evidence of implied authority in him to consent to cancellation, such implication is rebutted when the insurance company is informed that the broker has ceased to be the agent of the insured, or it appears that he is the agent only for the purpose of

obtaining certain additional insurance and having the form of policies changed.

Fowler Cycle Works v. Western Ins. Co., 111 Ill. App. 631.

RULE 37.

Company's Agent May be Also Authorized by Insured to Consent to Cancellation — Evidence — Ratification — Delivery of Substituted Policy.

An insurance agency, representing several companies, with authority to act on applications and issue policies, as well as to cancel the same in a proper case, may also act as the agent of the insured in waiving notice of cancellation or consenting to same, and in accomplishing the delivery of a new policy when substituted for the one canceled; and such agency may be established by a long course of conduct and uninterrupted custom, without express authority being conferred either in writing or by parol, but will not be presumed from one transaction;¹ nor does the insured ratify the unauthorized act of cancellation of one policy and substitution of another by bringing suit on the latter after a loss;² the delivery of the new or substituted policy is complete, though it may remain in the hands of the agent.³

1. *Johnson v. North British & M. Ins. Co.*, 66 Ohio St. 6, 63 N. E. Rep. 610; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. Rep. 1060, 23 Ins. L. J. 349; *Hamm Realty Co. v. New Hampshire Ins. Co.*, 80 Minn. 139, 83 N. W. Rep. 41, reaff'd, 84 Minn. 336, 87 N. W. Rep. 933. And see *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624, 68 S. W. Rep. 653; *Dibble v. Northern Assur. Co.*, 76 Mich. 1, 37 N. W. Rep. 704.

2. *Johnson v. North British & M. Ins. Co.*, *supra*.

3. *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. Rep. 1060, 23 Ins. L. J. 349; *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 37 N. W. Rep. 704. And see *Lum v. United States Ins. Co.*, 104 Mich. 397, 62 N. W. Rep. 562, 25 Ins. L. J. 53.

RULE 38.

No Presumption as to Authority of Soliciting Agent.

There is no presumption that a soliciting agent of the company has authority to cancel a policy upon request of the insured.

Phenix Ins. Co. v. Radford, Nebr. , 93 N. W. Rep. 1000.

RULE 39.

Agent no Power to Revive Canceled Policy.

An agent has no power to continue or revive a canceled policy, without evidence of express authority, which cannot be presumed;¹ cancellation once effected on notice by special agent is final, and the policy cannot be subsequently revived by his consent to let it stand unless newly authorized by the company.²

1. *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502.

2. *Colonial Assur. Co. v. National Ins. Co.*, 110 Ill. App. 471.

RULE 40.

Cancellation by Substitution of Other Policies.

Cancellation cannot be effected by attempted substitution of other policies without consent or authority of the insured, or without notice and payment or tender of the unearned premium;¹ if the substitution is without authority, the substituted company is not liable,² and the rights of the parties being fixed at

time of a loss, there can be no ratification by the insured thereafter;³ there can be no cancellation after a loss;⁴ but the insured having agreed to the substitution, the first policy may be surrendered and the substituted policy delivered after a loss by the agent representing both companies, and the latter is liable.⁵

1. *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632, aff'd, 162 N. Y. 597, without opinion; *Yoshimi v. Fidelity Ins. Co.*, 99 App. Div. 69, 91 N. Y. Supp. 393; *Kerr v. Milwaukee Mechanics' Ins. Co.*, 117 Fed. Rep. 442, 54 C. C. A. 616; *Insurance Co. N. A. v. Wisconsin Central Ry. Co.*, 134 Fed. Rep. 794, C. C. A. ; *Wisconsin Central Ry. Co. v. Phoenix Ins. Co.*, Wis. , 101 N. W. Rep. 703; *Clark v. Insurance Co. N. A.*, 89 Me. 26, 35 Atl. Rep. 1008, 35 L. R. A. 276; *Wilson v. New Hampshire Ins. Co.*, 140 Mass. 210, 16 Ins. L. J. 408; *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624, 68 S. W. Rep. 653. And see *Wilkins v. Insurance Co.*, 30 Ohio St. 317.

2. *Martin v. Palatine Ins. Co.*, 106 Tenn. 523, 61 S. W. Rep. 1024; *Lancashire Ins. Co. v. Nill*, 114 Pa. St. 248.

3. *Clark v. Insurance Co. N. A.*, 89 Me. 26, 35 Atl. Rep. 1008, 35 L. R. A. 276; *Crawford v. Aachen & Munich Ins. Co.*, 100 Ill. App. 454, aff'd, 199 Ill. 367, 65 N. E. Rep. 134; *Lancashier Ins. Co. v. Nill*, 114 Pa. St. 248; *Wilson v. New Hampshire Ins. Co.*, 140 Mass. 210, 16 Ins. L. J. 408. And see *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611; *Niagara Ins. Co. v. Raden*, 87 Ala. 311, 5 So. Rep. 876.

4. *Baker v. Citizens' Ins. Co.*, 51 Mich. 243; *Ritchie v. Home Ins. Co.*, 104 Mo. App. 146, 78 S. W. Rep. 341. And see *Johnson v. North British & M. Ins. Co.*, 66 Ohio St. 6, 63 N. E. Rep. 610; *Stone v. Franklin Ins. Co.*, 105 N. Y. 543, 12 N. E. Rep. 45; *Yoshimi v. Fidelity Ins. Co.*, 99 App. Div. 69, 91 N. Y. Supp. 393; *Cassville Roller Milling Co. v. Ætna Ins. Co.*, 105 Mo. App. 146, 79 S. W. Rep. 720.

5. *Whiteman v. American Central Ins. Co.*, 14 Lea. 327 (Tenn.).

RULE 41.

Substitution by Agreement or upon Condition.

When the insured applies for and obtains a certain policy under the agreement or condition that a prior

policy is to be canceled, and the former to be substituted or to take its place, the same agent acting for both companies, and fire occurs before actual cancellation, the insured cannot claim or enforce the substituted policy, independent of the agreement or condition upon which it is issued, and hence, making claim thereunder, he cannot enforce the prior policy, which must be regarded as canceled.

Beirmeister v. City of London Ins. Co., 15 N. Y. Supp. 433, 39 N. Y. St. Rep. 741, 61 Hun, 620 (memo. not reported), *aff'd*, 133 N. Y. 564, without opinion.

RULE 42.

As Affected by Intent — Effect of Recognition and Payment by Substituted Company.

If the insured by his agent obtains a policy in a certain company, and the purpose in so doing is not to increase the insurance, but to substitute such policy for another on account of a notice of cancellation, and the company thus substituted recognizes its responsibility and pays the insured the amount of its policy, the moment the risk is covered in the substituted policy the other is thereby canceled.

Arnfeld v. Guardian Assur. Co., 172 Pa. St. 605, 34 Atl. Rep. 580; *Larsen v. Thuringia American Ins. Co.*, 208 Ill. 166, 70 N. E. Rep. 331, *aff'g* 108 Ill. App. 420. And see *White v. Insurance Co. of N. Y.*, 93 Fed. Rep. 161; *Hopkins v. Phoenix Ins. Co.*, 78 Iowa, 344, 43 N. W. Rep. 197, 19 Ins. L. J. 90; *Beirmeister v. City of London Ins. Co.*, 15 N. Y. Supp. 433, 39 N. Y. St. Rep. 741, *aff'd*, 133 N. Y. 564, without opinion; *Birnstein v. Stuyvesant Ins. Co.*, 83 App. Div. 436, 82 N. Y. Supp. 140, *rev'g* 39 Misc. 808, 81 N. Y. Supp. 306.

RULE 43.

Unauthorized Substitution as Affecting Apportionment.

A wrongful or unauthorized substitution of one policy for another by the company's agent may call for apportionment of the loss under the apportionment clause in the first policy, upon which the claim is made, when the insured also makes claim against the other company.

Hartford Ins. Co. v. Peterson, 209 Ill. 112, 77 N. E. Rep. 757, rev'g 111 Ill. App. 466.

RULE 44.

Insured May Ratify Act of Agent in Replacing Insurance After Fire.

When an agent of the insurance company is instructed to cancel a certain policy, and without notice to the insured obtains another policy in another company to replace it, paying the premium therefor, the insured may after a fire elect to accept the new or substituted policy and to surrender the old policy. And this result is not affected by the fact that the old policy is figured or included in the adjustment by the other companies as part of the whole insurance in apportionment of the loss.

Larsen v. Thuringia American Ins. Co., 208 Ill. 166, 70 N. E. Rep. 31, aff'g 108 Ill. App. 420, citing and following *Arnfeld v. Guardian Assur. Co.*, 172 Pa. St. 605, 34 Atl. Rep. 580.
See Rule 42.

RULE 45.**When Insured Does not Waive Notice.**

The insured does not waive the five days' notice required by applying for other insurance in its place which is not operative as a contract when fire occurs.

Milwaukee Mechanics' Ins. Co. v. Graham, 181 Ill. 158, 54 N. E. Rep. 914.

RULE 46.**Remedy of Insured in Equity to Compel Issue of Substituted Policy.**

When the insured and the company's agent agree on transfer or removal of property, and for that purpose the insured gives up his old policy, and agrees to take a new one for the return premium at *pro rata* rates, and the company issues a new policy at short rate, which makes the policy terminate prior to the date of the old policy, and before latter is delivered, but after its expiration, fire occurs, but within a date covered by the old policy, the insured has remedy in equity to compel issue of policy as agreed.

Hardin v. Alexander Ins. Co., 90 Va. 413, 18 S. E. Rep. 911.

RULE 47.**Substituted Policy not a Contract of Reinsurance.**

An agreement by one insurance company with the agent of another to take a risk and issue a policy to certain property-owners, in lieu of one which latter company has ordered canceled, is not a contract of reinsurance of such canceling company against its risk so as to enable it to reimburse itself by suit in its own name for payment of a loss occurring before

the first policy is actually canceled and the latter delivered; if there is any right of action it is vested in the owners of the property; but second policy not having been accepted or delivered, the first company, on paying its loss and taking an assignment of all rights of the owners of the property in the undelivered policy, acquires no enforceable cause of action in its own name.

Merchants' Ins. Co. v. Union Ins. Co., 162 Ill. 173, 44 N. E. Rep. 409, rev'g 58 Ill. App. 611.

RULE 48.

Question of Fact or Law.

When the evidence is conflicting, the question of cancellation must be submitted to the jury;¹ and so when there is evidence of custom as affecting cancellation of oral insurance the question is for the jury;² when there is no dispute as to the facts, the verdict of a jury is not conclusive in an appellate court, and it is its duty to apply to the uncontroverted facts the legal result flowing from them.³

1. *Van Wert v. St. Paul F. & M. Ins. Co.*, 90 Hun, 465, 36 N. Y. Supp. 54; *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 So. Rep. 903; *Sun Ins. Co. v. Greenville Building & Loan Assoc.*, 58 N. J. L. 367, 33 Atl. Rep. 962, 25 Ins. L. J. 657. And see *Edwards v. Sun Ins. Co.*, Mo. App. , 73 S. W. Rep. 886.

2. *Insurance Co. of Ill. v. Manchester Assur. Co.*, 77 Ill. App. 673. And see *Underwood v. Greenwich Ins. Co.*, 161 N. Y. 413, 54 App. Div. 386, 66 App. Div. 531.

3. *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611.

RULE 49.

Omission to Cancel as Evidence of Waiver or Estoppel.

When the company, through its local or general agent, authorized to contract and issue policies, is advised by the insured of a fact which may work a forfeiture under a condition in the policy, the company should, within a reasonable time, notify the insured of its determination to cancel the policy and return the unearned premium; its failure to do so may be evidence tending with the other facts to show a waiver or estoppel in misleading the insured.

Phoenix Ins. Co. v. Grove, Ill. , 74 N. E. Rep. 141; *Horton v. Home Ins. Co.*, 122 N. C. 498, 29 S. E. Rep. 944; *Norris v. Hartford Ins. Co.*, 57 S. C. 358, 35 S. E. Rep. 572; *Pearlstone v. Westchester Ins. Co.*, S. C. , 49 S. E. Rep. 4; *Madden & Co. v. Phoenix Assur. Co.*, S. C. , 49 S. E. Rep. 855; *German-American Ins. Co. v. Harper*, Ark. , 86 S. W. Rep. 817; *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, 25 S. E. Rep. 417; *Bellevue Roller Mill Co. v. London & Lancashire Ins. Co.*, 4 Ida. 307, 39 Pac. Rep. 196, 24 Ins. L. J. 331; *Schmurr v. State Ins. Co.*, 30 Oreg. 29, 46 Pac. Rep. 363, 26 Ins. L. J. 373; *North British & M. Ins. Co. v. Steiger*, 26 Ill. App. 228, aff'd, 124 Ill. 81, 16 N. E. Rep. 95. And see *Texas Banking Co. v. Hutchins*, 53 Tex. 61; *Hamilton v. Home Ins. Co.*, 94 Mo. 253; *Crescent Ins. Co. v. Griffin*, 59 Tex. 509; *East Texas Ins. Co. v. Crawford*, Tex. , 16 S. W. Rep. 1068, 21 Ins. L. J. 39; *Farmers & Merchants' Ins. Co. v. Nixon*, 2 Colo. App. 265, 30 Pac. Rep. 42; *Mississippi Home Ins. Co. v. Dobbins*, 81 Miss. 623, 33 So. Rep. 504; *Swedish-American Ins. Co. v. Knutson*, 67 Kans. 71, 72 Pac. Rep. 526; *Glens Falls Ins. Co. v. Michael*, Ind. , 74 N. E. Rep. 964; *Richard v. Springfield F. & M. Ins. Co.*, La. , 38 So. Rep. 563.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver." Also this volume, title "Agents."

RULE 50.

Limitation of Cancellation as Evidence of Waiver.

By claiming and maintaining the right to cancel the policy with full knowledge of the facts, and retaining

the earned premium, an insurance company waives its right to object that valid insurance had never been effected.

New Jersey Rubber Co. v. Commercial Union Assur. Co., 64 N. J. L. 580, 46 Atl. Rep. 777; *Commercial Assur. Co. v. New Jersey Rubber Co.*, 61 N. J. Eq. 446, 49 Atl. Rep. 155; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342.

RULE 51.

Same Subject — When Insurance Itemized.

When the insurance is itemized, but there is only one premium in the aggregate, and the policy is forfeited as to one of the items, the failure or omission to return the unearned premium is no evidence of waiver of the forfeiture.

Miller v. Insurance Co. N. A., Mo. App. , 80 S. W. Rep. 330.

In *Senor & Muntz v. Western Millers' Ins. Co.*, 181 Mo. 104, 79 S. W. Rep. 687, it is suggested, though not actually decided, that the omission to return the unearned premium is no evidence of waiver when the policy has not been surrendered by the insured.

RULE 52.

Mere Omission to Cancel no Evidence of Waiver.

When the insured has incurred a forfeiture by violation of the conditions of the policy, it is not necessary for the company to pay or to tender the unearned premium as a condition precedent to its right to assert the breach and claim the forfeiture;¹ the mere omission or failure to cancel is no evidence of waiver.²

1. *Davison v. London & Lancashire Ins. Co.*, 189 Pa. St. 132, 28 Ins. L. J. 152, 42 Atl. Rep. 2; *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. Rep. 295; *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342,

47 S. E. Rep. 101; *Johnson v. American Ins. Co.*, 41 Minn. 396, 43 N. W. Rep. 59; *English v. Franklin Ins. Co.*, 55 Mich. 273, 14 Ins. L. J. 377. And see *Buchanan v. Westchester Ins. Co.*, 61 N. Y. 611.

2. *West End Hotel Co. v. American Ins. Co.*, 74 Fed. Rep. 114; *Fischer v. London & Lancashire Ins. Co.*, 83 Fed. Rep. 810; *Girard Ins. Co. v. Hebard*, 95 Pa. St. 45, 10 Ins. L. J. 425; *Smith v. Continental Ins. Co.*, 6 Dak. 433, 43 N. W. Rep. 810; *Palmer v. Continental Ins. Co.*, 31 Mo. App. 467; also preceding cases under 1.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 30, note.

Some of the old forms in terms provided that the policy *might* be canceled on increase of risk in certain *specified* contingencies, and upon the facts it was held that such contingencies occurring, the omission to cancel could be regarded as evidence of waiver. There is an obvious distinction suggested by language of such conditions, not always considered by the courts, and which will probably account to some extent for the confusion. See *Albany City Ins. Co. v. Keating*, 46 Ill. 395; and for example of old forms see also *Williams v. People's Ins. Co.*, 57 N. Y. 274, where the condition read as follows: "If the above-mentioned premises shall, during this insurance, be occupied or used so as to increase the risk, or by the erection of any building or buildings, or by the use or occupation of neighboring premises, this company, after notice given to the insured, or his or her representative, of their intention to terminate the insurance, will refund a ratable proportion of the premium."

And in *Lattomus v. Farmers' Ins. Co.*, 3 Houst. 404 (Del.), it was held that the company was bound on notice of increase of risk to exercise its option of cancellation, and if it did not do so, the omission became evidence of waiver of forfeiture on *that ground*.

And to same effect was *Eclipse Ins. Co. v. Schoemer*, 2 Cin. Supr. 474; *Firemen's Fund Ins. Co. v. Sholom*, 80 Ill. 558. And see *Joyce v. Maine Ins. Co.*, 45 Me. 168.

In *Phoenix Ins. Co. v. Boyer*, 1 Ind. App. 329, 27 N. E. Rep. 628, the company was notified of the fact of vacancy, and *refused* to return the unearned premium *and cancel* the policy, and it was held evidence of waiver.

And so when a condition *required* the insured to *notify the company of vacancy* and he *did* so, it was held that the company could terminate the insurance only by cancellation.

Wakefield v. Orient Ins. Co., 50 Wis. 532.

RULE 53.

Right of Company to Deduct Commissions Allowed — Right of Broker to Commissions.

Upon cancellation by the insurance company, it has no right as between it and the insured to deduct from the unearned premium the amount it has allowed or paid a broker as commissions;¹ the broker on cancellation is only entitled to commissions upon the earned premium.²

1. *McKenna v. Firemen's Ins. Co.*, 30 Misc. 727, 63 N. Y. Supp. 164.

2. *Devereux v. Rochester German Ins. Co.*, 98 N. C. 6, 3 S. E. Rep. 639.

RULE 54.

Construction of Agent's Agreement for a Percentage of Premiums Received.

When agents under an agreement are entitled to a percentage "of the premiums received," this means the premiums as and when received, and not the balance after deducting the unearned portion in case of cancellation.

Garfield v. Rutland Ins. Co., 69 Vt. 549, 38 Atl. Rep. 235, 26 Ins. L. J. 1019.

RULE 55.

Duty and Liability of Company's Agent.

An agent of the insurance company, whose duty it is to cancel policies upon receiving instructions to that effect, must promptly comply therewith, and is personally liable to the company for any loss which it may be compelled to pay on account of the negligent

omission to perform such duty;¹ it may be a defense if the agent has effected insurance in another company as a substitute.² The agent is not relieved by an ineffectual attempt to cancel through insured's broker,³ even though he acts in accordance with a local custom.⁴

1. *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409, 31 N. W. Rep. 454, 16 Ins. L. J. 301; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290, 13 Ins. L. J. 768; *Washington Ins. Co. v. Chesebro*, 35 Fed. Rep. 477; *American Central Ins. Co. v. Hagerty*, 21 Misc. 213, 45 N. Y. Supp. 617; *Norwood v. Alamo Ins. Co.*, 13 Tex. Civ. App. 475, 35 S. W. Rep. 717; *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513, 16 Ins. L. J. 75.

2. *North British & M. Ins. Co. v. Lambert*, 26 Oreg. 199, 37 Pac. Rep. 909.

3. *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290, 13 Ins. L. J. 768.

4. *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. 21.

RULE 56.

When Company's Agent not Charged with Duty of Cancellation.

If, under a written contract of appointment, the company's agent is not charged with the duty of seeing to the cancellation of policies, unless it is shown, independent of the written contract, that this additional matter of agency has been conferred upon such agent and by him accepted, he is not charged with the duty of cancellation, and if not so charged with such duty he cannot be guilty of negligence, justifying a recovery for damages in neglecting to cancel a policy as instructed by the company.

Norwood v. Alamo Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. Rep. 717.

RULE 57.

Agent Cannot use Company's Funds to Cancel Policies in His Own Interest.

An agent cannot use his company's funds to cancel policies to further his own interests, knowing that the company is retiring from business, such cancellation not being regularly required by the holders of the policies. If he makes such wrongful use of the money he will have to account for it to receivers of the company subsequently appointed;¹ and same principle applies where the agent, knowing that his agency is about to be revoked, makes use of his company's funds in same way. His cancellation and payment of return premiums is no defense to a suit brought by the company against him to recover the premiums on policies canceled.² An agent is not entitled to credit for return or unearned premiums on policies canceled by him to serve his own personal ends, and not at the request of either party.³

1. *American Casualty Co. v. Arrott*, 180 Pa. St. 1, 36 Atl. Rep. 319. And see *Franzen v. Zimmer*, 90 Hun, 103, 35 N. Y. Supp. 612.

2. *Northern Assur. Co. v. Hamilton*, 50 Nebr. 248, 69 N. W. Rep. 781, 26 Ins. L. J. 824. And see *Merchants' Ins. Co. v. Prince*, 50 Minn. 53, 52 N. W. Rep. 131.

3. *German-American Ins. Co. v. Tribble*, 86 Mo. App. 546.

RULE 58.

Agent May Buy Claims for Unearned Premiums.

An agent of an insurance company who has ceased to act as such may buy from the holders of policies previously issued by him as such agent, and as as-

signee thereof enforce their claims for unearned premiums; the policyholders have an absolute right to cancel their policies, and the fact that they were induced to do so by the former agent is no defense.

Scottish Union & Nat. Ins. Co. v. Dangaix, 103 Ala. 388, 15 So. Rep. 956. And see *Franzen v. Hutchinson*, 94 Iowa, 95, 62 N. W. Rep. 698.

RULE 59.

Agent's Act Must be Authorized to Sustain Claim for Reimbursement.

When an agent, contrary to the instructions received from his company, and of his own individual motion, and not at request of the assured, cancels policies and pays the unearned premiums to policyholders who had not requested cancellation, for such willful and unauthorized action, he has no claim for reimbursement against his company or its receiver.

Equitable Ins. Co. v. Wildberger, 74 Miss. 375, 20 So. Rep. 858.

RULE 60.

When Trustees of Insurance Company not Entitled to Credit for Payment of Unearned Premiums.

When the trustees of an insurance company orally guarantee to policyholders the payment of unearned premiums in case of cancellation by the company, such agreement is not enforceable as within the statute of frauds, and the trustees cannot deduct from the funds of the company in their possession amounts paid by them under such an agreement.

Garfield v. Rutland Ins. Co., 69 Vt. 549, 38 Atl. Rep. 235, 26 Ins. L. J. 1019.

TITLE II.

Agents.

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81. Instructions to agent should be clear and unambiguous.
82. Local agent not liable for fraudulent act of clerk or solicitor.
83. Company's agent no power to bind company by contract to insure in the future — May be bound personally.
84. Personal liability of agent under statute.
85. Agent's personal responsibility to insured for misrepresentation.
86. As between agent and company damages on breach of contract of agency.
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91. Authority of agent question of fact.
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94. Agent stockholder, director, and officer of another corporation.
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96. Agent director of school district.
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RULE 1.

As Imposed by Contract.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Missouri,	Rhode Island.
New Jersey,	

The standard form of policy prescribed in Michigan is the same, except the first clause, as follows:

"In any matter relating to the procuring of this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company."

The standard form of policy prescribed in Wisconsin does not contain the first clause. It does contain the second clause or paragraph beginning with the words "this policy is made and accepted subject, etc.," but there is added at the end a clause as follows:

"Up to the time of the delivery of this policy to assured, in all transactions relating to this policy or to the property herein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company."

The standard form of policy prescribed in South Dakota provides:

"Any person who solicits insurance or issues policies of insurance, or procures applications therefor, shall be held to be, and considered, the general agent of the insurer issuing the policy or making a renewal thereof, except as to proof of loss and adjustment thereof."

The standard form of policy prescribed in:

Maine,	Minnesota,
Massachusetts,	New Hampshire,

does not contain either or any of the above provisions, or relating thereto.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

* See note to "Concealment," Rule 1, page 2.

RULE 2.

Agency Founded upon Contract — Consent of Principal Essential.

Agency springs from contract, the consent of the principal, express or implied, being essential to its creation; and if an insurance company has not clothed a supposed agent with any authority, real or apparent, the acts and declarations of such person, as to the company, are *res inter alios acta*, not affecting the company, and the insurance company cannot be estopped from asserting a contractual right by the acts, declarations, or mistakes of such person.

Sellers v. Commercial Ins. Co., 105 Ala. 282, 24 Ins. L. J. 354, 16 So. Rep. 798.

RULE 3.

Burden of Proof as to Agency — Question of Fact or Law.

Agency is a fact the burden of proving which rests upon the party affirming its existence; and it must be proved by other evidence than the acts or declarations of the supposed agent before it can be assumed that he represents and has authority to affect or bind the principal. When the facts are ascertained the existence of agency is a question of law.

Sellers v. Commercial Ins. Co., 105 Ala. 282, 16 So. Rep. 798, 24 Ins. L. J. 354; *Continental Ins. Asscc. v. Bearden*, 29 Tex. Civ. App. 569, 69 S. W. Rep. 982. And see *O'Leary v. German-American Ins. Co.*, 100 Iowa, 390, 69 N. W. Rep. 686, 27 Ins. L. J. 510; *Brown v. Dutchess County Ins. Co.*, 64 App. Div. 9, 71 N. Y. Supp. 670; *Devens v. Mechanics & Traders' Ins. Co.*, 83 N. Y. 168; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Carpenter v. Continental Ins. Co.*, 61 Mich. 635, 15 Ins. L. J. 667; *Atlantic Ins. Co. v. Carlin*, 58 Md. 337; *American Underwriters' Assoc. v. George*, 97 Pa. St. 238; *Lancashire Ins. Co. v. Nill*, 114 Pa. St. 248; *Biggs v. North Carolina Home Ins. Co.*, 88 N. C. 141, 13 Ins. L. J. 302.

RULE 4.

Agency Clause in Policy Inoperative when Company has Clothed a Person with Apparent Authority — If no Other Evidence, Conclusive as to Status of Broker.

An insurance company may clothe a person with authority to represent it as its agent, and if it does, no agency clause in the policy can operate to make its agent the agent of the insured;¹ in the absence of evidence of authority, an agency clause in the policy is conclusive as to status of a broker.²

1. *Hart v. Niagara Ins. Co.*, 9 Wash. 620, 38 Pac. Rep. 213, 27 L. R. A. 86; *Meyers v. Lebanon Ins. Co.*, 156 Pa. St. 420, 27 Atl. Rep. 39, 23 Ins. L. J. 308; *Landes v. Safety Ins. Co.*, 190 Pa. St. 536, 42 Atl. Rep. 961; *Eilenberger v. Protective Ins. Co.*, 89 Pa. St. 464; *Lebanon Ins. Co. v. Humes*, 113 Pa. St. 591; *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. Rep. 732, 25 Ins. L. J. 247; *Gans v. St. Paul Ins. Co.*, 43 Wis. 108; *Whited v. Germania Ins. Co.*, 76 N. Y. 415; *Chase v. People's Ins. Co.*, 14 Hun, 456; *North British & M. Ins. Co. v. Crutchfield*, 108 Ind. 518, 16 Ins. L. J. 178; *Commercial Ins. Co. v. Allen*, 80 Ala. 571; *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.*, 2 S. D. 17, 48 N. W. Rep. 310, 20 Ins. L. J. 871; *Sullivan v. Phoenix Ins. Co.*, 34 Kans. 170; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Commercial Ins. Co. v. Ives*, 56 Ill. 402. And see *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Joy v. Pennsylvania Ins. Co.*, 35 Mo. App. 165; *Beebe v. Hartford Ins. Co.*, 25 Conn. 51; *Graham v. Ontario Ins. Co.*, 14 Ont. 358 (Can.).

2. *McGrath v. Home Ins. Co.*, 88 App. Div. 153, 84 N. Y. Supp. 374.

Old forms contained a clause reading as follows: "It is a part of this contract, that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company under any circumstances whatever, or in any transaction relating to this insurance," and it was held binding upon the assured and to prevent waiver or estoppel by knowledge of a soliciting agent of the company authorized to take or receive applications for insurance.

Rohrbach v. Germania Ins. Co., 62 N. Y. 47; *Alexander v. Germania Ins. Co.*, 66 N. Y. 464.

Both of these cases were, however, limited in *Whited v. Germania Ins. Co.*, 76 N. Y. 419; and in *Chase v. People's Ins. Co.*, 14 Hun, 456, *Alexander v. Germania Ins. Co.* is referred to as having been overruled.

In *Millville Ins. Co. v. Collerd*, 9 Vroom, 480 (N. J.), it was held that such a clause was binding upon the assured, who must be regarded as assenting to it when he accepts the policy.

But in *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.*, 2 S. D. 17, 48 N. W. Rep. 310, 20 Ins. L. J. 871, it was held that such a clause was not binding upon the assured as to any act prior to the delivery of the policy, or unless notice was given to him prior to the completion of negotiation. And see also *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *Gates v. Penn Ins. Co.*, 10 Hun, 489 (N. Y.); *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. Rep. 587; *Crouse v. Insurance Co.*, 79 Mich. 249.

Other old forms provided that "If any broker or other person than the assured have procured this policy or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company in any transaction relating to the insurance." And it was held to determine the status of a broker, in receiving amount of premium upon an issue of cancellation for nonpayment of the premium.

Wilber v. Williamsburg City Ins. Co., 122 N. Y. 439, and as determining status of a broker. See also *Wood v. Firemen's Ins. Co.*, 126 Mass. 316.

RULE 5.

Policy not Conclusive as to Agent's Authority — May be Clothed with Actual or Apparent Authority as to Waiver.

The tendency of the weight of authority is against making restrictions in the policy upon an agent's authority conclusive upon the assured; the company, or any agent with general or unlimited powers, clothed with an actual or apparent authority, may, either orally or in writing, waive any written or printed condition in the policy, notwithstanding such restrictions.

Pope v. Glens Falls Ins. Co., 130 Ala. 356, 30 So. Rep. 496; *Niagara Ins. Co. v. Lee*, 73 Tex. 641, 11 S. W. Rep. 1024. And see following rules.

RULE 6.

Agency open to Inquiry as to Facts — Status not Determined by Policy — Unless Policy only Evidence.

Agency is open to inquiry as to the facts, and the legal status of any particular person is not necessarily or conclusively fixed and determined by the language of the policy,¹ unless the policy is the only evidence of authority.²

1. *Lumbermen's Ins. Co. v. Bell*, 166 Ill. 400, 45 N. E. Rep. 130; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. Rep. 31; *Frost v. North British & M. Ins. Co.*, Vt. , 60 Atl. Rep. 803.

2. *Quinlan v. Providence-Washington Ins. Co.*, *supra*; *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781. And see *McGrath v. Home Ins. Co.*, 88 App. Div. 153, 84 N. Y. Supp. 374.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 9, 10, and 27.

RULE 7.

Authority of a Soliciting Agent not Limited by Agency Clause in Policy.

Where an insurance company has clothed a soliciting agent with authority to take applications, the scope of such authority is not limited by an agency clause in the policy subsequently delivered.

Kausal v. Minnesota Farmers' Ins. Co., 31 Minn. 17, 12 Ins. L. J. 657; *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.*, 2 S. D. 17, 48 N. W. Rep. 310, 20 Ins. L. J. 871; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253. And see *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Crouse v. Hartford Ins. Co.*, 79 Mich. 249, 44 N. W. Rep. 496. See and compare *Millville Ins. Co. v. Colled*, 9 Vroom, 480 (N. J.).

See also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 23.

RULE 8.

Acceptance of Written Application from a Soliciting Agent as Ratification — Company can Take no Advantage of Agency Clause in Policy.

After an insurance company, upon a written application taken by one who acted as its agent, issues its

policy thereon, it cannot escape responsibility for his errors in such application upon the plea that such agent had no written authority to act for the company, as required by the terms of the policy; acceptance of an application purporting to have been taken by its agent, and issue of the policy, amounts to ratification.

Landes v. Safety Mut. Ins. Co., 190 Pa. St. 536, 42 Atl. Rep. 961. And see *Meyers v. Lebanon Ins. Co.*, 156 Pa. St. 420, 27 Atl. Rep. 39, 23 Ins. L. J. 308.

RULE 9.

Form in Countersigning by Agent.

Although policy provides that it shall not be valid unless countersigned by an agent, the insurance company cannot object that a policy is not formally countersigned when both policy and renewal receipt are issued with the agent's name written upon them as completed instruments.

Hibernia Ins. Co. v. O'Connor, 29 Mich. 241. And see *German Ins. Co. v. Laggart*, 47 Kans. 663. But see *Lynn v. Burgoyne*, 13 B. Mon. 400 (Ky.), where it was held that a policy signed by "B. for the agent" was void.

RULE 10.

Effect of Insurance Company Authorizing Soliciting of Insurance — Estoppel.

Where an insurance company authorizes the soliciting of insurance, it clothes the agent for that purpose with apparent authority to bind it by all acts within the scope of his authority, not only when he inserts false answers in a written application; even if they are all true, if he knows of facts affecting the insur-

ance, the company is bound by his knowledge;¹ and it operates as an estoppel notwithstanding a clause in the policy subsequently delivered that no person shall be deemed the company's agent unless authorized in writing.²

1. *Dryer v. Security Ins. Co.*, Iowa, , 82 N. W. Rep. 494; *Jacobs v. St. Paul Ins. Co.*, 86 Iowa, 145, 53 N. W. Rep. 101; *Medearis v. Anchor Ins. Co.*, 104 Iowa, 88, 73 N. W. Rep. 495; *Jordan v. State Ins. Co.*, 64 Iowa, 216, 13 Ins. L. J. 779; *Gurnett v. Atlas Mutual Ins. Co.*, Iowa, , 100 N. W. Rep. 542; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; *Arff v. Star Ins. Co.*, 125 N. Y. 57; *Carpenter v. German-Amer. Ins. Co.*, 135 N. Y. 298, 31 N. E. Rep. 1015, 22 Ins. L. J. 57; *Chase v. People's Ins. Co.*, 14 Hun, 456; *Bernard v. United Ins. Assoc.*, 17 Misc. 115, 39 N. Y. Supp. 1143; *Davis v. Lamar Ins. Co.*, 18 Hun, 230; *Baker v. Home Ins. Co.*, 64 N. Y. 648; *Mead v. Saratoga Ins. Co.*, 81 App. Div. 282; *Hayes v. Saratoga Ins. Co.*, 81 App. Div. 287; *McGonigle v. Susquehanna Mutual Ins. Co.*, 168 Pa. St. 1, 31 Atl. Rep. 868, 24 Ins. L. J. 808; *Burson v. Philadelphia Fire Assoc.*, 136 Pa. St. 267, 20 Atl. Rep. 401; *Foster v. Pioneer Ins. Assoc.*, Wash. , 79 Pac. Rep. 798; *London & Lancashire Ins. Co. v. Gerteson*, 106 Ky. 815, 51 S. W. Rep. 617; *Kausal v. Minnesota Farmers' Ins. Co.*, 31 Minn. 17; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393; *Germania Ins. Co. v. Wingfield*, 57 S. W. Rep. 456 (Ky.); *Citizens' Ins. Co. v. Crist*, 56 S. W. Rep. 658 (Ky.); *Wolf v. Dwelling-House Ins. Co.*, 86 Mo. App. 580; *Combs v. Hannibal Ins. Co.*, 43 Mo. 148; *Hart v. Niagara Ins. Co.*, 9 Wash. 620, 38 Pac. Rep. 213, 27 L. R. A. 86; *Harding v. Norwich Union Ins. Soc.*, 10 S. D. 64, 71 N. W. Rep. 755, 26 Ins. L. J. 901; *Woolpert v. Franklin Ins. Co.*, 42 W. Va. 647, 26 S. E. Rep. 531; *Deitz v. Insurance Co.*, 31 W. Va. 851; *Simmons v. Insurance Co.*, 8 W. Va. 474; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. Rep. 514; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646, 48 N. W. Rep. 296; *Kitchen v. Hartford Ins. Co.*, 57 Mich. 135, 14 Ins. L. J. 594; *German Ins. Co. v. Rounds*, 35 Nebr. 752, 53 N. W. Rep. 660; *Home Ins. Co. v. Gurney*, 56 Nebr. 306, 76 N. W. Rep. 553; *State Ins. Co. v. Jordan*, 29 Nebr. 514, 45 N. W. Rep. 792; *Hahn v. Guardian Assur. Co.*, Oreg. , 32 Pac. Rep. 683; *Wooldridge v. German Ins. Co.*, 69 Mo. App. 413; *Williams v. Bankers & Merchants' Ins. Co.*, 73 Mo. App. 607;

Beebe v. Hartford Ins. Co., 25 Conn. 51; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Planters' Ins. Co. v. Meyers*, 55 Miss. 479; *Sias v. Roger Williams Ins. Co.*, 8 Fed. Rep. 183, 10 Ins. L. J. 500; *Farmers' Ins. Co. v. Williams*, 39 Ohio St. 584, 13 Ins. L. J. 133; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Packard v. Dorchester Ins. Co.*, 77 Me. 144, 15 Ins. L. J. 475; *Rockford Ins. Co. v. Boirum*, 40 Ill. App. 129; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. Rep. 333; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. Rep. 100; *Mullin v. Vermont Ins. Co.*, 58 Vt. 113; *Hanson v. Milwaukee Mechanics' Ins. Co.*, 45 Wis. 321. And see *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. Rep. 779; *Beal v. Park Ins. Co.*, 16 Wis. 241. And see Rules 7 and 8.

2. *Hart v. Niagara Ins. Co.*, 9 Wash. 620, 38 Pac. Rep. 213, 27 L. R. A. 86; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Deitz v. Providence-Washington Ins. Co.*, 31 W. Va. 851, 8 S. E. Rep. 616; *Smith v. Home Ins. Co.*, 47 Hun, 30 (N. Y.); *Partridge v. Commercial Ins. Co.*, 17 Hun, 95; *Susquehanna Ins. Co. v. Cusick*, 109 Pa. St. 157. And see *Kausal v. Minnesota Ins. Co.*, 31 Minn. 17; *Commercial Ins. Co. v. Ives*, 56 Ill. 402. See also Rule 7.

RULE II.

Responsibility for Errors or Omissions in Written Application — Authority of Agent — Question of Fact.

When the company's agent is correctly informed as to the facts, his errors or omissions in filling up an application for insurance are chargeable to the company and not to the assured;¹ it makes no difference if the insured knows that he has no authority to issue policies;² and the authority of the agent may be a proper question for the jury.³ When not correctly informed by the insured, a misdescription is not the act of the agent so as to estop the company.⁴ The insured is responsible for his own misstatements,⁵ or for what he expressly or impliedly authorizes.⁶ And whether the agent is agent of the insured or of the company in taking or making the application is a

proper question for the jury.⁷ An agent of the company cannot be regarded as agent of the assured in filling up an application without some evidence of request or authority.⁸

1. *Farmers' Ins. Assoc. v. Williams*, 95 Va. 248, 28 S. E. Rep. 214; *Lynchburg Ins. Co. v. West*, 76 Va. 575, 12 Ins. L. J. 51; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. Rep. 514, 22 Ins. L. J. 377; *State Ins. Co. v. DuBois*, 7 Colo. App. 214, 44 Pac. Rep. 756; *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. St. 420, 27 Atl. Rep. 39, 23 Ins. L. J. 308; *Smith v. Farmers & Mechanics' Ins. Co.*, 89 Pa. St. 287; *Kansas Farmers' Ins. Co. v. Saindon*, 52 Kans. 486, 35 Pac. Rep. 15, 23 Ins. L. J. 208, reaff'd on rehearing, 53 Kans. 623, 36 Pac. Rep. 983; *Sullivan v. Phoenix Ins. Co.*, 34 Kans. 170; *Manchester Assur. Co. v. Dowell*, 80 S. W. Rep. 207; *American Ins. Co. v. Walston*, 111 Ill. App. 133; *Ormsby v. Laclede Ins. Co.*, 105 Mo. App. 143, 79 S. W. Rep. 733; *Bushnell v. Farmers' Ins. Co.*, Mo. App. , 85 S. W. Rep. 103; *Phoenix Ins. Co. v. Lorenz*, 34 N. E. Rep. 495, 22 Ins. L. J. 712, denying rehearing of 33 N. E. Rep. 444; *Phoenix Ins. Co. v. Wartenberg*, 79 Fed. Rep. 245, 24 C. C. A. 547, 48 U. S. App. 344, 26 Ins. L. J. 552; *Campbell v. Merchants' Ins. Co.*, 37 N. H. 35; *Rowley v. Empire Co.*, 36 N. Y. 550; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243, 12 N. E. Rep. 609, 16 Ins. L. J. 971; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Kelly v. Troy Ins. Co.*, 3 Wis. 254; *Key v. Des Moines Ins. Co.*, 77 Iowa, 174, 41 N. W. Rep. 614; *Bartholemew v. Merchants' Ins. Co.*, 25 Iowa, 507; *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 693; *James River Ins. Co. v. Merritt*, 47 Ala. 387; *Simmons v. Insurance Co.*, 8 W. Va. 474; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Farmers' Ins. Co. v. Williams*, 39 Ohio St. 584, 13 Ins. L. J. 133; *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Hough v. City Ins. Co.*, 29 Conn. 10; *Guardian Ins. Co. v. Connelly*, 20 Can. S. C. 208. And see *Baker v. Home Ins. Co.*, 64 N. Y. 648; *Beal v. Park Ins. Co.*, 16 Wis. 241.

2. *Bowlus v. Phoenix Ins. Co.*, 113 Ind. 106, 32 N. E. Rep. 319; *American Ins. Co. v. Gallatin*, 48 Wis. 36.

3. *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. Rep. 732, 25 Ins. L. J. 247.

4. *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. 479 (N. Y.); *Lowell v. Middlesex Ins. Co.*, 8 Cush. 127 (Mass.). And see *Sexton v. Montgomery Ins. Co.*, 9 Barb. 191 (N. Y.).

5. *Wilson v. Conway Ins. Co.*, 4 R. I. 141. And see *Liberty Hall Assoc. v. Housatonic Ins. Co.*, 7 Gray, 261 (Mass.).

6. *Smith v. Empire Ins. Co.*, 25 Barb. 497 (N. Y.); *American Ins. Co. v. Gilbert*, 27 Mich. 429.

7. *Commercial Ins. Co. v. Ives*, 56 Ill. 402.

8. *Hingston v. Aetna Ins. Co.*, 42 Iowa, 46; *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495.

And see "Warranty."

RULE 12.

Scope of Agent's Authority.

An insurance company which has conferred general power on an agent cannot escape responsibility for a particular act of the agent within the scope of the general power;¹ a general agent, unless specially restricted, has powers coextensive, as to the business in which engaged, with those of his principal;² but the company cannot be affected by any act of the agent not within the scope of his authority.³

1. *Franklin Ins. Co. v. Bradford*, 201 Pa. St. 32, 50 Atl. Rep. 286; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101; *Ruggles v. American Central Ins. Co.*, 114 N. Y. 415; *Lightbody v. North American Ins. Co.*, 23 Wend. 18; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. Rep. 869; *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, 84 S. W. Rep. 551 (Ky.). And see *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (N. Y.); *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495, 13 Ins. L. J. 45; *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460; *Richard v. Springfield F. & M. Ins. Co.*, La. , 38 So. Rep. 563.

2. *Steen v. Niagara Ins. Co.*, 89 N. Y. 315.

3. *Kelly v. Troy Ins. Co.*, 3 Wis. 254; *Duluth Nat. Bank v. Knoxville Ins. Co.*, 85 Tenn. 76, 1 S. W. Rep. 689.

RULE 13.

Notice to Company Through its Officer or Agent — Exceptions.

The general doctrine is that notice communicated to or knowledge acquired by the officers or agents of a corporation when acting in their official capacity or within the scope of their agency is notice to or knowledge of the corporation. It is said there are but three exceptions — matters which the agent has forgotten entirely or may have forgotten under the circumstances of the case; matters which for special reasons he could not impart to his principal, and matters which the previous conduct of the agent, or the fact that he is engaged in some fraud upon the principal make it certain that he will conceal.

German Ins. Co. *v.* Shader, Nebr. , 93 N. W. Rep. 972.

RULE 14.

Scope of Authority not Limited by Private Instructions — Authority of Local Agent not Established by Assumption.

The authority of an agent, acting within the apparent scope of it, is not narrowed by private or undisclosed instructions unless there is something in the nature of the particular business transacted or in the facts or circumstances of the case to indicate that the agent is acting under special instructions or limited powers;¹ a local agent as such does not have unlimited authority and his power cannot be established by his assumption in doing the act relied upon.²

1. *Brown v. Franklin Ins. Co.*, 165 Mass. 565, 43 N. E. Rep. 512, 25 Ins. L. J. 630; *Parker & Young Mfg. Co. v. Exchange Ins. Co.*, 166 Mass. 484, 44 N. E. Rep. 614; *Michigan F. & M.*

Ins. Co. v. Wich, 8 Colo. App. 409, 46 Pac. 687; Howard Ins. Co. v. Owens, 94 Ky. 197, 21 S. W. Rep. 1037.

2. Reynolds v. Continental Ins. Co., 36 Mich. 131.

RULE 15.

Authority, how Determined — Insured not Bound by Secret Instructions — Test of Authority.

The authority of an agent as to those dealing with him must be determined by the nature of his business, and is *prima facie* coextensive with its requirements; persons dealing with insurance agents, acting within the apparent scope of their authority, are not bound by instructions or limitations which are not brought to the knowledge of such persons;¹ the question is not what power the agent did in fact possess, but what power did the insurance company hold him out to the public as possessing.²

1. Robinson v. Ætna Ins. Co., 128 Ala. 477, 30 So. Rep. 665; Commercial Ins. Co. v. Morris, 105 Ala. 498, 18 So. Rep. 34; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 So. Rep. 46, 24 Ins. L. J. 447; Medley v. German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. Rep. 101; Fire Ins. Co. of Philadelphia v. Sinsabaugh, 101 Ill. App. 55; Hartford Ins. Co. v. Farrish, 73 Ill. 166; Hartford Ins. Co. v. Wilcox, 57 Ill. 180; Rockford Ins. Co. v. Nelson, 65 Ill. 415; Eclectic Ins. Co. v. Fahrenkrug, 68 Ill. 463; Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. Rep. 615; Ruggles v. American Central Ins. Co., 114 N. Y. 415; Lewis v. Guardian Assur. Co., 181 N. Y. 392, 74 N. E. Rep. 224, aff'g 93 App. Div. 157; Goldwater v. Liverpool, L. & G. Ins. Co., 39 Hun, 176, aff'd, 109 N. Y. 618, 15 N. E. Rep. 895, on opinion below; Angell v. Hartford Ins. Co., 59 N. Y. 171; Fire Assoc v. Masterson, Tex. Civ. App. , 83 S. W. Rep. 49; Insurance Co. N. A. v. Bell, Tex. Civ. App. , 60 S. W. Rep. 262; Insurance Co. v. Lyons, 38 Tex. 253; Coles v. Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. Rep. 732, 25 Ins. L. J. 247; Sheppard v. Peabody Ins. Co., 21 W. Va. 368; Brown v. Franklin Ins. Co., 165 Mass. 565, 43 N. E. Rep.

512, 25 Ins. L. J. 630; *Parker & Young Mfg. Co. v. Exchange Ins. Co.*, 166 Mass. 484, 44 N. E. Rep. 614; *California Ins. Co. v. Gracey*, 15 Colo. 70, 24 Pac. Rep. 577; *State Ins. Co. v. Du Bois*, 7 Colo. App. 214, 44 Pac. Rep. 756; *Johnson v. Scottish Union & Nat. Ins. Co.*, 93 Wis. 223, 67 N. W. Rep. 416, 26 Ins. L. J. 59; *Teutonia Ins. Co. v. Ewing*, 90 Fed. Rep. 217, 32 C. C. A. 583, 28 Ins. L. J. 282; *Germania Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. Rep. 41; *Commercial Union Assur. Co. v. State*, 113 Ind. 331, 15 N. E. Rep. 158; *Hartford Ins. Co. v. Trimble*, Ky., 78 S. W. Rep. 462; *Howard Ins. Co. v. Owens*, 94 Ky. 197, 21 S. W. Rep. 1037; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. Rep. 453; *Kenton Ins. Co. v. Shea*, 6 Bush, 174 (Ky.); *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. Rep. 463; *Mutual Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. Rep. 209; *Continental Ins. Co. v. Kasey*, 25 Gratt. 268 (Va.); *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; *Dayton Ins. Co. v. Kelley*, 24 Ohio St. 345; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Lattomus v. Farmers' Ins. Co.*, 3 Houst. 404 (Del.); *American Central Ins. Co. v. McLanathan*, 11 Kans. 533; *Western Home Ins. Co. v. Hogue*, 41 Kans. 524, 21 Pac. Rep. 641; *Insurance Co. v. McCain*, 6 Otto, 84 (U. S.); *Millville Ins. Co. v. Mechanics' Loan Assoc.*, 43 N. J. L. 652; *Brownfield v. Phoenix Ins. Co.*, 26 Mo. App. 390; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. Rep. 240, 21 Ins. L. J. 72; *Rivara v. Queens Ins. Co.*, 62 Miss. 720. And see *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; *Miller v. Scottish Union & Nat. Ins. Co.*, 101 Mich. 49, 59 N. W. Rep. 439, 23 Ins. L. J. 725.

2. *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. Rep. 732, 25 Ins. L. J. 247. And see *McCabe v. Dutchess County Ins. Co.*, 14 Hun, 599 (N. Y.).

RULE 16.

Limitation of Apparent Authority.

An agent has apparent authority only to insure in the modes authorized by the charter of the company, and upon the terms and conditions inserted in its policies in ordinary use.

De Grove v. Metropolitan Ins. Co., 61 N. Y. 594.

RULE 17.

Scope of Authority as to Kind of Property or Risk.

If an agent has authority to insure one kind of property it does not necessarily include authority to take risks of any kind, and if there is any such presumption it is rebutted by the fact that the agent receives and forwards the application to the company to pass upon and determine its acceptance or rejection.

Smith v. State Ins. Co., 58 Iowa, 487.

RULE 18.

No Authority to Insure Destroyed Property.

An agent has no authority to insure property which has been destroyed.

Stebbins v. Lancashire Ins. Co., 60 N. H. 65, 13 Ins. L. J. 698; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421, aff'g 19 Barb. 595; *Mead v. Phoenix Ins. Co.*, 158 Mass. 124.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Fraud or False Swearing," Rule 23.

RULE 19.

Scope of Authority as to Territory.

A general agent authorized to issue policies in a particular city and its vicinity may act within the scope of his authority in issuing a policy upon property in another city 100 miles distant, and the company cannot escape liability to the insured by private instructions to such agent;¹ the insurance company must be prompt in repudiating or canceling a risk taken by an agent outside of his territory, as otherwise it may be deemed to have ratified his act.²

1. *Lightbody v. North American Ins. Co.*, 23 Wend. 18. And see *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W.

Rep. 240, 21 Ins. L. J. 72; *Mohr v. Ohio Ins. Co.*, 13 Fed. Rep. 74; *Hanover Ins. Co. v. Ames*, 39 Minn. 150; *Howard Ins. Co. v. Owens*, 94 Ky. 197, 21 S. W. Rep. 1037, 22 Ins. L. J. 514.

2. *Mohr v. Ohio Ins. Co.*, *supra*. And see *Knox v. Lycoming Ins. Co.*, 50 Wis. 671.

RULE 20.

Construction of Authority as Agent or Surveyor.

When an insurance agent, by written commission or authority, is authorized to act as "agent or surveyor," the word "surveyor" is not construed to limit or qualify the effect of the word "agent."

Lycoming Ins. Co. v. Woodworth, 83 Pa. St. 223. And see *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. Rep. 453.

RULE 21.

Partnership or Firm as Agent of Company.

If a partnership or firm is authorized by the insurance company to act as its agent, one member of such firm has all the power of the firm;¹ a commission to two agents jointly expires with the death of one, and the survivor cannot bind the company without evidence of authority or subsequent ratification;² when the commission is issued to one person only who is a member of a partnership, it is authority to him only, unless extended to the partnership by acts of the firm recognized and ratified by the company.³

1. *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray, 204 (Mass.).

2. *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180.

3. *United Ins. Co. v. Insurance Co. N. A.*, 42 Ind. 588; *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123.

RULE 22.

Effect of Agent Holding Commissions from Other Companies — Presumption as to Knowledge and Practice in Selecting Companies — Question of Fact.

When an insurance company makes a person agent for it who at same time holds commissions from other companies, they must be held to know that it is the practice of such agencies to make selections of the insurer or company which is to assume a particular risk, and after loss they cannot be heard to deny that such agent had authority to do so. At most the question is usually one of fact if not of law.

Fire Ins. Co. of Philadelphia *v.* Sinsabaugh, 101 Ill. App. 55.

RULE 23.

Liability of Company for Acts of Agent in Malicious Prosecution — Must be Authorized.

An insurance company may be liable for the acts of its agent within the scope of his authority in malicious prosecution in the company's name by his connivance;¹ his acts must be within the scope of his authority.²

1. *Turner v. Phoenix Ins. Co.*, 55 Mich. 236.

2. *Kelly v. Troy Ins. Co.*, 3 Wis. 254.

RULE 24.

Agent Acting After Resignation.

An agent may resign and still bind the company if he continues to supervise the work of his successor with the knowledge and consent of the company.

Ganser v. Firemen's Fund Ins. Co., 38 Minn. 74, 17 Ins. L. J. 105.

RULE 25.

Agency May Continue After Revocation—Agent May be Representative of Insured.

When third parties have dealt with an agent clothed with general powers, the agency continues as to them, after revocation, until they have notice thereof. And the principal may be liable for acts of the agent after revocation, to third persons, who never dealt with him previously, if they, in common with the public at large, are justified in believing that such agency existed, and have no notice of its revocation;¹ rule may be otherwise when an agent ceases to act for the company upon removal.² And in such a case he may be deemed the representative of the insured in receiving and transmitting a notice required by the company.³

1. *Continental Ins. Co. v. Brooks*, 131 Ala. 614, 30 So. Rep. 876; *Merchants' Ins. Co. v. Oberman*, 99 Ill. App. 357; *Springfield F. & M. Ins. Co. v. Davis*, 18 Ky. L. Rep. 654; *Burlington Ins. Co. v. Threlkeld*, 60 Ark. 539, 31 S. W. Rep. 265, 25 Ins. L. J. 32; *Re Pelican Ins. Co.*, 47 La. Ann. 935, 17 So. Rep. 427, 24 Ins. L. J. 535; *Insurance Co. v. McCain*, 6 Otto, 84 (U. S.).

2. *Burlington Ins. Co. v. Campbell*, 42 Nebr. 208, 60 N. W. Rep. 599, 24 Ins. L. J. 379. And see *Montross v. Williams*, 49 Mich. 477, where the court admits company might be bound if consideration is paid to the agent in absence of knowledge.

3. *Strunk v. Firemans' Ins. Co.*, 160 Pa. St. 345, 28 Atl. Rep. 779, 23 Ins. L. J. 475.

RULE 26.

Effect of Dissolution of Partnership of Agents — Insured Bound to Inquire as to Authority.

When a policy is obtained from a firm of insurance agents, subsequently dissolved, one of them continuing the insurance business with another partner, but ceas-

ing to represent the company issuing the policy, notice afterward given to him by the assured is ineffectual to bind the first company, even although the assured is ignorant of the dissolution of the firm, and that the company had ceased to be represented or terminated its agency; the insured is bound to inquire as to authority of the agent.

Greenwich Ins. Co. v. Sabotnick, 91 Ga. 717, 17 S. E. Rep. 1026, 23 Ins. L. J. 154.

RULE 27.

Effect of Leaving Blank Policies with Agent — Secret Revocation.

When an agent has acted as the general agent of the company in issuing policies, and his acts have been adopted by the company, and so long as it leaves policies with him, thus enabling him to continue dealing with the public upon the strength of his previous agency, and to use its policies, no secret revocation of his power can absolve the company from liability to third persons dealing upon the strength of such apparent authority without any knowledge of the revocation of such authority.

Marshall v. Reading Ins. Co., 78 Hun, 83, 29 N. Y. Supp. 334, *aff'd*, 149 N. Y. 617, without opinion.

RULE 28.

When Written Authority or Commission Conclusive.

The written authority or commission of an agent is conclusive, in the absence of evidence that the company has ever held out the agent as possessing greater

or other powers than therein contained;¹ but ceases to be conclusive as soon as there is any such evidence.²

1. *Trask v. German Ins. Co.*, 58 Mo. App. 431. And see *Wilson v. Genesee Ins. Co.*, 14 N. Y. 418; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495, 13 Ins. L. J. 45. And see *Robinson v. Ætna Ins. Co.*, 135 Ala. 650, 34 So. Rep. 18.

2. *Farmers' Ins. Co. v. Taylor*, 73 Pa. St. 342.

See Rule 6, and compare various rules under this title.

In *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495, 13 Ins. L. J. 45, it was held not proper on a trial for company's counsel to ask an officer of the insurance company "what was ———'s authority as agent of the company?" as the question calls for opinion of the witness, and that such authority is properly proved by his written commission or power of attorney, or by a resolution of the company's board of directors.

RULE 29.

Authority of Officers of Company — Presumption — Evidence — Question of Fact.

An insurance company necessarily acts and speaks by its officers, and what they say and do in the discharge of their duty as such is evidence against the company;¹ and their authority as such, in absence of evidence to contrary, may be presumed;² or if necessary to be proved, it is not essential that it be established by a formal resolution of the board of directors; usual course of business without objection or repudiation by the company is sufficient to make the question of authority one for the jury.³

1. *Muhleman v. National Ins. Co.*, 6 W. Va. 508. And see *Sussex County Ins. Co. v. Woodruff*, 2 Dutch. 541 (N. J.); *Davis v. Farmers' Ins. Co.*, 134 N. C. 60, 45 S. E. Rep. 955.

2. *Conover v. Mutual Ins. Co.*, 3 Den. 254, aff'd, 1 N. Y. 290; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

3. *Conover v. Mutual Ins. Co.*, *supra*.

RULE 30.

Admissions or Declarations of Agent as Evidence.

The statements or declarations of an officer or agent are inadmissible to affect the insurance company, unless in respect to a transaction in which he is authorized to appear for the company, and he has no authority to bind the company by any statements as to past transactions. Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by him which constitute part of the transaction which is at issue between the parties;¹ admissions or declarations of an agent may be admissible though related to a past transaction with which he had no connection, if made while acting within the scope of his agency, and relating to a subject in reference to which he is empowered to act for the company.² If the evidence of such statements is not legally competent, it is not made competent and proper for purpose of disproving the agent's denial of the alleged admission.³ Admission of an agent that he had delivered a policy may be admissible as *res gestæ*.⁴

1. Baptist Church v. Brooklyn Ins. Co., 28 N. Y. 153; Brown v. Dutchess County Ins. Co., 64 App. Div. 9, 71 N. Y. Supp. 670; Continental Ins. Co. v. Cummings, Tex., 81 S. W. Rep. 705; Bartlett v. Firemen's Fund Ins. Co., 77 Iowa, 155, 18 Ins. L. J. 554; Idaho Forwarding Co. v. Firemen's Fund Ins. Co., Utah, 29 Pac. Rep. 826, 21 Ins. L. J. 756; Merchants' Bank v. Clark, 139 N. Y. 314, citing Morawetz on Private Corporations. And see Scott v. Home Ins. Co., 53 Wis. 238, 11 Ins. L. J. 177.

2. Bartlett v. Firemen's Fund Ins. Co., *supra*; Ruthven v. American Ins. Co., 102 Iowa, 550, 71 N. W. Rep. 574, 27 Ins. L. J. 593.

3. Baptist Church *v.* Brooklyn Ins. Co., *supra*.

4. Scott *v.* Home Ins. Co., 53 Wis. 238.

In *White v. Miller*, 71 N. Y. 118, 135, the New York Court of Appeals says: "The general rule is, that what one person says, out of court, is not admissible to charge or bind another. The exception is in cases of agency; and in cases of agency, the declarations of the agent are not competent to charge the principal, upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with, the business then depending, so that they constituted a part of *res gestae*." In *Farlie v. Hastings* (10 Ves. 127) Sir William Grant expressed, with great clearness and accuracy, the doctrine upon this subject. He said: "What an agent has said may be what constitutes the agreement of the principal or the representations or statements made may be the foundation of, or the inducement to the agreement. Therefore, if a writing is not necessary by law, the evidence must be admitted, to prove the agent did make that statement or representation. So, with regard to acts done, the words with which these acts are accompanied frequently tend to determine their quality. The party therefore, to be bound by the act, must be affected by the words. But, except in one or the other of these ways, I do not know how, what is said by an agent can be evidence against the principal. The mere assertion of the fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. (See also *Story* on Ag., §§ 134, 137; *Thalheimer v. Brinckerhoff*, 4 Wend. 394; *Hubbard v. Elmer*, 7 Wend. 446; *Luby v. H. R. R. Co.*, 17 N. Y. 131.) The rule that the declarations of the agent are inadmissible to bind the principal, unless they constitute the agreement which he is authorized to make, or relate to and accompany an act done in the course of the agency, is applicable in all cases, whether the agent is a general or special one, or the principal is a corporation or private person. (*Angell & Ames on Corp.*, § 309, 1 Gr. Ev., § 114a.)"

RULE 31.

Authority of Agent not Proved by Admission — May be by His Testimony — Policy May be Evidence.

While the rule is that the authority of an agent cannot be proved by his admission or declaration this

does not prevent proof of his authority by his testimony;¹ the policy itself may also acknowledge the status of a certain person as agent,² creating a question of fact as to acts being within apparent scope of authority.³

1. *O'Leary v. German-Amer. Ins. Co.*, 100 Iowa, 390, 69 N. W. Rep. 686, 27 Ins. L. J. 510; *Murphy v. Mechanics & Traders' Ins. Co.*, 83 Mo. App. 481; *Robinson v. Ætna Ins. Co.*, 135 Ala. 650, 34 So. Rep. 18; *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 29 S. E. Rep. 245.

2. *Wilson v. Commercial Union Assur. Co.*, *supra*; *Lewis v. Guardian Assur. Co.*, 181 N. Y. 392, 74 N. E. Rep. 224, aff'g 93 App. Div. 157.

3. *Lewis v. Guardian Assur. Co.*, *supra*.

RULE 32.

Possession of Blank Policies as Evidence of Authority — Soliciting Agent.

The possession of blank policies and renewal receipts, signed by the officers of an insurance company, by an agent with power to fill up the blanks, to countersign, and issue the same as completed contracts of insurance, is evidence of a general agency;¹ but the mere fact that soliciting agent authorized to take applications, is required to indorse or countersign a policy which might be issued by the company, is not evidence of a general agency or authority to make a contract of insurance, such agent not being supplied with policies, and having no power to issue them.²

1. *Grabbs v. Farmers' Ins. Co.*, 125 N. C. 389, 34 S. E. Rep. 503; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. Rep. 236, 20 Ins. L. J. 784; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101; *Parsons v. Knox-*

ville Ins. Co., 132 Mo. 583, 31 S. W. Rep. 117, 24 Ins. L. J. 852; German-Amer. Ins. Co. v. Humphrey, 62 Ark. 348, 25 Ins. L. J. 658, 35 S. W. Rep. 428; Howard Ins. Co. v. Owens, 94 Ky. 197, 21 S. W. Rep. 1037, 22 Ins. L. J. 514; Marshall v. Reading Ins. Co., 78 Hun, 83, 29 N. Y. Supp. 334, aff'd, without opinion, 149 N. Y. 617; Post v. Ætna Ins. Co., 43 Barb. 351 (N. Y.); Carroll v. Charter Oak Ins. Co., 40 Barb. 292, aff'd, 10 Abb. Pr. N. S. 166, 1 Abb. Ct. App. Dec. 316 (N. Y.); Goldwater v. Liverpool, L. & G. Ins. Co., 39 Hun, 176, aff'd, 109 N. Y. 618, on opinion below; Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. Rep. 615, aff'g 66 Hun, 546, 21 N. Y. Supp. 664; Pitney v. Glens Falls Ins. Co., 65 N. Y. 6; Lightbody v. North American Ins. Co., 23 Wend. 18 (N. Y.); Smith v. Farmers' Ins. Co., 111 Ga. 737, 36 S. E. Rep. 957; Hartford Ins. Co. v. Keating, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; Wytheville Ins. Co. v. Teiger, 90 Va. 277, 18 S. E. Rep. 195; Hardin v. Alexandria Ins. Co., 90 Va. 413, 18 S. E. Rep. 911; Mutual Ins. Co. v. Ward, 95 Va. 231, 28 S. E. Rep. 209; Beebe v. Ohio Farmers' Ins. Co., 93 Mich. 514, 53 N. W. Rep. 818; Phoenix Ins. Co. v. Public Parks Amusement Co., 63 Ark. 187, 37 S. W. Rep. 959; Wass v. Maine Ins. Co., 61 Me. 537; Gloucester Mfg. Co. v. Howard Ins. Co., 5 Gray, 497 (Mass.); Putnam v. Home Ins. Co., 123 Mass. 324; Dayton Ins. Co. v. Kelley, 24 Ohio St. 345; Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. Rep. 77; German-Amer. Ins. Co. v. Yellow Poplar Lumber Co., 84 S. W. Rep. 551 (Ky.); Richard v. Springfield F. & M. Ins. Co., La. , 38 So. Rep. 563.

2. *Armstrong v. State Ins. Co.*, 61 Iowa, 212, 12 Ins. L. J. 673.

RULE 33.

Effect of Furnishing an Agent with Blank Applications.

An insurance company which furnishes an agent with blank applications for the purpose of procuring insurance thereby clothes him with apparent authority as soliciting agent, notwithstanding an agency clause in the policy, and the company is bound by his knowledge, when the policy issues.

Partridge v. Commercial Ins. Co., 17 Hun, 95 (N. Y.). And see *Union Ins. Co. v. Chipp*, 93 Ill. 96.

RULE 34.

Custom and Course of Business as Evidence of Authority.

The custom or usual course of business of an agent acquiesced in or ratified by the insurance company becomes evidence of authority in such agent binding the company;¹ but evidence of custom of other companies is not admissible.²

1. *Illinois Ins. Co. v. Stanton*, 57 Ill. 354; *Farmers' Ins. Co. v. Taylor*, 73 Pa. St. 342; *Day v. Mechanics & Traders' Ins. Co.*, 88 Mo. 325; *Zell v. Herman Farmers' Ins. Co.*, 75 Wis. 521, 44 N. W. Rep. 828. And see *Fayles v. National Ins. Co.*, 49 Mo. 380; *McCabe v. Dutchess County Ins. Co.*, 14 Hun, 599 (N. Y.); *Phoenix Ins. Co. v. Munger*, Kans. , 30 Pac. Rep. 120, 21 Ins. L. J. 682.

2. *Bradford v. Homestead Ins. Co.*, 54 Iowa, 598, 10 Ins. L. J. 141.

RULE 35.

Conversations with Persons in Office of Company.

Conversations with persons in the office of an insurance company, when acted upon by the company, may be competent evidence, although the insured cannot say positively that they were officers or agents.

Brock v. Des Moines Ins. Co., 106 Iowa, 30, 75 N. W. Rep. 683, 27 Ins. L. J. 893.

RULE 36.

Letters from Insurance Company as Evidence.

Letters written on paper with letterhead of the insurance company, in answer to letters written to the company, and signed by its secretary and superintendent of the loss department are presumed to be written by persons duly authorized.

Bloom v. State Ins. Co., 94 Iowa, 359, 62 N. W. Rep. 810, 25 Ins. L. J. 511.

RULE 37.

When Agent not Clothed with Apparent Authority to Issue Policies.

A request by the company to a person who has assumed, without authority, to issue a policy, that he collect the balance due from a former agent whose business he had purchased, or that he make up the latter's accounts from the books, or that he mail a canceled policy, does not give him apparent authority to issue policies.

Rahr v. Manchester Assur. Co., 93 Wis. 355, 67 N. W. Rep. 725, 25 Ins. L. J. 750.

RULE 38.

Company not Allowed to Prove it Would have Done Differently by Another Agent or Same Agent — Agent's Understanding and Willingness not Admissible.

When an insurance company is legally bound by the acts of an agent, it will not be permitted to prove that it would have done differently by another agent,¹ or by the same agent;² nor can an agent be permitted to swear to his understanding and willingness to make a certain indorsement if he had thought it necessary.³

1. *Lightbody v. North American Ins. Co.*, 23 Wend. 18 (N. Y.).

2. *Perkins v. Equitable Ins. Co.*, 4 Allen, 562 (N. B.).

3. *Carlin v. Western Assur. Co.*, 57 Md. 515, 12 Ins. L. J. 388.

RULE 39.

Daily Report of Agent as Evidence.

The daily report of an agent to his company is not competent or admissible evidence as against the in-

sured unless it is made as a part of the transaction with the insured relating to the insurance.

Phoenix Ins. Co. v. La Pointe, 118 Ill. 384, 16 Ins. L. J. 58; *Thayer v. Providence Ins. Co.*, 70 Me. 531.

RULE 40.

Insured's Construction of Agent's Meaning not Admissible.

While what an agent said and did may be competent and proper evidence, the insured's construction of the agent's meaning is not proper testimony.

McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 13 Ins. L. J. 216.

RULE 41.

Who is a General Agent — Soliciting Agent.

An agent having general authority from an insurance company to fix rates, accept risks, issue policies and renewals, to collect premiums, and cancel policies, is a general agent for the locality;¹ a mere soliciting agent with authority to receive and forward applications is not a general agent as matter of law.²

1. *Hartford Ins. Co. v. Orr*, 56 Ill. App. 629; *German Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. Rep. 41; *Manufacturers & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. Rep. 553; *Parsons v. Knoxville Ins. Co.*, 132 Mo. 583, 31 S. W. Rep. 117, 24 Ins. L. J. 852; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 23 S. E. Rep. 744, 25 Ins. L. J. 459, 30 L. R. A. 842; *Howard Ins. Co. v. Owens*, 94 Ky. 197, 21 S. W. Rep. 1037; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. Rep. 779; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Alman Miller Co. v. Phoenix Ins. Co.*, 27 Iowa, 203; *Post v. Aetna Ins. Co.*, 43 Barb. 351 (N. Y.); *Ellis v. Albany Ins. Co.*, 50 N. Y. 402; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *North Berwick Co. v. New England Ins. Co.*, 52 Me. 336; *Goldwater v. Liverpool, L. & G. Ins. Co.*, 39 Hun, 176, *aff'd*, 109 N. Y. 618, on opinion below.

2. *Merserau v. Phoenix Ins. Co.*, 66 N. Y. 274.

In *Mechanics' Bank v. N. Y. & N. H. R. Co.*, 13 N. Y. 599, 632, the New York Court of Appeals says: "There are in the books many loose expressions concerning the distinction between a general and special agency. The distinction itself is highly unsatisfactory, and will be found quite insufficient to solve a great variety of cases. It is not profitable to dwell upon that distinction. Underlying the whole subject there is this fundamental proposition, that a principal is bound only by the authorized acts of his agent. This authority may be proved by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power can be established. But in whichever way this is done, it cannot be limited by secret instructions of the principal on the one hand, nor can it be enlarged by the unauthorized representation of the agent on the other. The distinction is not always attended to between the apparent powers of an agent and his acts apparently but not really within the power. An agent's apparent powers are those which are conferred by the terms of his appointment, notwithstanding secret instructions, or those with which he is clothed by the character in which he is held out to the world, although not strictly within his commission. Whatever is done under an authority thus manifested is actually within the authority as to third persons, and the principal is bound for that reason. But it is obvious that an agent may clothe his act with all the *indicia* of authority, and yet the act itself may not be within the real or apparent power. The appearance of the power is one thing, and for that the principal is responsible. The appearance of the act is another, and for that, if false, I think the remedy is against the agent only. The fundamental proposition, I repeat, is, that one man can be bound only by the authorized acts of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

RULE 42.

Limitation in Policy as to Evidence of Agency Does not Prevent Employment of Clerks.

The provision in the policy that no one not holding the commission of the company shall be considered as

its agent does not prevent an agent's employment of the usual and necessary clerical and other assistance, in order to enable him to properly perform his duties as a commissioned agent of the company; and when thus employed, the ordinary rules of law are applicable to their acts and positions.

Arff v. Star Ins. Co., 125 N. Y. 57, 25 N. E. Rep. 1073, 20 Ins. L. J. 112, 10 L. R. A. 609.

RULE 43.

Clerks and Employees of a General Agent.

An insurance company is responsible not only for the acts of its general agents, but also for the acts of the clerks and employees of the agents, to whom they delegate authority to discharge their functions, within the scope of their agency;¹ it is presumed that a general agent of a foreign insurance company has power to appoint subagents.²

1. *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 23 S. E. Rep. 744, 30 L. R. A. 842, 25 Ins. L. J. 459; *Insurance Co. N. A. v. Thornton*, 130 Ala. 222, 30 So. Rep. 614; *Waldman v. North B. & M. Ins. Co.*, 91 Ala. 170, 8 So. Rep. 666, 20 Ins. L. J. 353; *Hamm Realty Co. v. New Hampshire Ins. Co.*, 84 Minn. 336, 87 N. W. Rep. 933; and see previous appeal, 80 Minn. 139, 83 N. W. Rep. 41; *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. Rep. 514, 22 Ins. L. J. 377; *German Ins. Co. v. Rounds*, 35 Nebr. 752, 53 N. W. Rep. 660; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298, 31 N. E. Rep. 1015, 22 Ins. L. J. 57; *Northern Assur. Co. v. Assoc. Mfrs.' Ins. Co.*, 97 App. Div. 634, 90 N. Y. Supp. 14; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; *Davis v. Lamar Ins. Co.*, 18 Hun. 230 (N. Y.); *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13, 26 S. W. Rep. 763; *Hartford Ins. Co. v. Josey*, 6 Tex. Civ. App. 290, 25 S. W. Rep. 685; *International Trust Co. v. Norwich Union Ins. Soc.*, 71 Fed. Rep. 81, 17 C. C. A. 608; *Thuringia Ins. Co. v. Goldsmith*, 132 Fed. Rep. 456, C. C. A. ; *Germania Ins. Co.*

v. Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. Rep. 41; *Harding v. Norwich Union Ins. Soc.*, 10 S. D. 64, 71 N. W. Rep. 755, 26 Ins. L. J. 901; *South Bend Toy Mfg. Co. v. Dakota Ins. Co.*, 2 S. D. 17, 48 N. W. Rep. 310, 20 Ins. L. J. 871; *aff'd*, on rehearing, 52 N. W. Rep. 866; *McGonigle v. Susquehanna Ins. Co.*, 168 Pa. St. 1, 31 Atl. Rep. 868, 24 Ins. L. J. 808; *Grady v. American Central Ins. Co.*, 60 Mo. 116; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Krumm v. Jefferson Ins. Co.*, 40 Ohio St. 225, 13 Ins. L. J. 122; *Phoenix Ins. Co. v. Hart*, 39 Ill. App. 517; *Insurance Co. of Pa. v. O'Connell*, 34 Ill. App. 357; *Continental Ins. Co. v. Ruckmann*, 127 Ill. 364, 20 N. E. Rep. 77; *Deitz v. Providence-Washington Ins. Co.*, 33 W. Va. 526, 11 S. E. Rep. 50; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600; *Washington Ins. Co. v. Davison*, 30 Md. 91.

2. *Kuney v. Amazon Ins. Co.*, 36 Hun, 66 (N. Y.).

In *Summers v. Commercial Union Ins. Co.*, 6 Duval, 19 (Can. S. C.), it was held that in the appointment of a local agent there was no implied authority for him to authorize any other parties to act for the company.

And see *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148; also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 26.

RULE 44.

Authority of Clerk of General Agent — Evidence.

Anyone dealing with the clerk of a general agent is not bound to inquire as to his authority; evidence of his duties in the office, his custom of passing upon applications for insurance, signing the name of the agent to policies and reports, is competent as bearing upon his acts within the scope of his authority.

Germania Ins. Co. v. Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. Rep. 41.

RULE 45.

Estoppel by Clerk.

A clerk of an agent of an insurance company estops the latter when policy is issued with his knowledge of

facts which might otherwise void the insurance, as much as the agent himself;¹ but a clerk has no implied authority as such to waive a forfeiture of the policy.²

1. *Bergeron v. Pamlico Ins. Co.*, 111 N. C. 45, 15 S. E. Rep. 883, 22 Ins. L. J. 182; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600.

2. *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. Rep. 428, 25 Ins. L. J. 658; *Home Ins. Co. v. Garbacz*, 48 Nebr. 827, 67 N. W. Rep. 864. And see *Waldman v. North British & M. Ins. Co.*, 91 Ala. 170, 8 So. Rep. 666, 20 Ins. L. J. 353.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 26.

RULE 46.

Soliciting Agent no Authority to Make Contract of Insurance — Evidence as to His Authority — Question of Fact.

A soliciting agent having no other power than to solicit a contract of insurance and submission to the company of any proposition or application he might be able to secure has not sufficient authority to bind an insurance company in making contract of insurance. Proof of the mere assumption of authority by him without proof, also, of acquiescence by the company in the appearance he held out, or a ratification by it of his acts in pursuance of the power assumed, with knowledge of the assumption which shall have misled the assured as to the extent of the authority he possessed, will not establish extent of the agent's power;¹ but when such an agent has authority to reject an application, it may create such an inference of authority to accept same, as to require the submission of the question to a jury.²

1. *Agricultural Ins. Co. v. Fritz*, 61 N. J. L. 211, 39 Atl. Rep. 910, 27 Ins. L. J. 710; *Fireman's Fund Ins. Co. v. Rogers*,

108 Ga. 191, 33 S. E. Rep. 954; *Embree v. German Ins. Co.*, 62 Mo. App. 132; *O'Brien v. New Zealand Ins. Co.*, 108 Cal. 227, 41 Pac. Rep. 298; *Winchell v. Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. Rep. 503; *Armstrong v. State Ins. Co.*, 61 Iowa, 212; *Dryer v. Security Ins. Co.*, 94 Iowa, 471, 62 N. W. Rep. 798, 24 Ins. L. J. 541; *Walker v. Farmers' Ins. Co.*, 51 Iowa, 679; *Farmers & Merchants' Ins. Co. v. Graham*, 50 Nebr. 818, 70 N. W. Rep. 386, 26 Ins. L. J. 711; *Insurance Co. v. Johnson*, 23 Pa. St. 72; *Chase v. Hamilton Ins. Co.*, 22 Barb. 527, rev'd, but on another point, 20 N. Y. 52; *More v. New York Bowery Ins. Co.*, 130 N. Y. 537, 21 Ins. L. J. 228; *Winnesheik v. Holzgrafe*, 53 Ill. 516; *Haden v. Farmers & Mechanics' Ins. Co.*, 80 Va. 683, 15 Ins. L. J. 497; *East Texas Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. Rep. 572; *Hambleton v. Home Ins. Co.*, 6 Biss. 91 (U. S. Cir.); *Fleming v. Hartford Ins. Co.*, 42 Wis. 616; *Summers v. Commercial Union Ins. Co.*, 6 Duval, 19 (Can.).

2. *Trask v. German Ins. Co.*, 53 Mo. App. 625. And see *Palin v. Medina Ins. Co.*, 20 Ohio St. 529.

RULE 47.

Limitation of Authority of a Soliciting Agent.

The insurance company may limit the authority of a soliciting agent by sufficient terms in a blank application furnished such agent¹ when brought to the notice or knowledge of the insured;² a soliciting agent authorized to receive and forward applications, and on receipt of the policy to deliver it and to collect the premium, is not a general agent as matter of law.³

1. *Delaware Ins. Co. v. Harris*, 26 Tex. Civ. App. 537, 64 S. W. Rep. 867; *Lama v. Dwelling-House Ins. Co.*, 51 Mo. App. 447; *Shoup v. Dwelling-House Ins. Co.*, 51 Mo. App. 286. And see *Sowden v. Standard Ins. Co.*, 44 Up. Can. Q. B. 95, 5 Tupper, 290; *Bleakley v. Niagara Dist. Ins. Co.*, 16 Grant Ch. 198 (Can.).

2. *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646, 48 N. W. Rep. 296, 20 Ins. L. J. 463.

3. *Merserau v. Phoenix Ins. Co.*, 66 N. Y. 274.

RULE 48.

Soliciting Agent no Power as to Waiver After Issue of Policy — Authority of Same.

An agent with authority only to solicit risks, receive applications, deliver policies, and collect premiums, has no power as such to waive any breach of the conditions of the policy after its issue;¹ or to make indorsements,² or consent to assignments.³

1. *Tabor v. Rockingham Ins. Co.*, 69 N. H. 666, 45 Atl. Rep. 479; *Heath v. Springfield Ins. Co.*, 58 N. H. 414; *Hausen v. Citizens' Ins. Co.*, 66 Mo. App. 29; *Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Torrop v. Imperial Ins. Co.*, 34 N. B. 113, aff'd, 26 Can. S. C. 585; *American Ins. Co. v. Walston*, 111 Ill. App. 133; *Garretson v. Merchants' Ins. Co.*, 81 Iowa, 727, 45 N. W. Rep. 1047, 19 Ins. L. J. 913; *A. M. Todd Co. v. Farmers' Ins. Co.*, Mich., 100 N. W. Rep. 442; *Healey v. Imperial Ins. Co.*, 5 Nev. 268; *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 So. Rep. 116; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386, 8 So. Rep. 148, 19 Ins. L. J. 961; *Golden v. Northern Assur. Co.*, 46 Minn. 471, 49 N. W. Rep. 246; *American Ins. Co. v. Hampton*, 54 Ark. 75, 14 S. W. Rep. 1092; *Robinson v. Mercer Co. Ins. Co.*, 3 Dutch. 134 (N. J.); *Liverpool, L. & G. Ins. Co. v. Van Os*, 63 Miss. 431; *Harrison v. City Ins. Co.*, 9 Allen, 231 (Mass.); *Cedar Rapids Ins. Co. v. Shimp*, 16 Bradw. 248 (Ill.). And see *East Texas Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. Rep. 572; *German-American Ins. Co. v. Waters*, 10 Tex. Civ. App. 363, 30 S. W. Rep. 576; *Dryer v. Security Ins. Co.*, 94 Iowa, 471, 62 N. W. Rep. 798, 24 Ins. L. J. 541; *Stickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466; *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; *Dickinson v. Mississippi Valley Ins. Co.*, 41 Iowa, 286; *Thayer v. Agricultural Ins. Co.*, 5 Hun, 566 (N. Y.); *Crane v. City Ins. Co.*, 2 Flippin, 576 (U. S. Cir.); *Home Ins. Co. v. Sorsby*, 60 Miss. 302, 12 Ins. L. J. 381.

2. *Wilson v. Genesee Ins. Co.*, 14 N. Y. 418; *Golden v. Northern Assur. Co.*, 46 Minn. 471, 49 N. W. Rep. 246.

3. *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. Ct. App. Dec. 315, 3 Keyes, 280 (N. Y.).

RULE 49.

Mere Solicitation of Insurance Does not Constitute a Person an Agent of Company — Must be Evidence of Authority.

The mere fact that a certain person solicits the insurance, and subsequently procures a policy from the insurance company, does not make him the agent of the company; there must be some evidence of authority or power conferred upon him by the company.

Kings County Ins. Co. v. Swigert, 11 Ill. App. 590.

RULE 50.

Allowance of Commissions to a Person Does not Make him Agent of Company.

The mere fact that a person engaged in the insurance business has an understanding with a general agent of an insurance company as to the amount of his commissions on all business, or insurance, procured by him, does not make him an agent of the insurance company within the rule binding the company by the acts and knowledge of soliciting agents.

Phoenix Ins. Co. v. Spiers, 87 Ky. 285, 8 S. W. Rep. 453. And see *McGrath v. Home Ins. Co.*, 88 App. Div. 153, 84 N. Y. Supp. 374.

RULE 51.

Act of Soliciting Agent May be Ratified by the Company — Effect.

When the act of a soliciting agent in making an indorsement upon a policy, as, for instance, making the loss payable to a mortgagee, is confirmed and ratified by the insurance company and the policy then delivered to the insured, the agent is thereby clothed

with general apparent authority as to the particular policy or risk, and what he says in construction of such indorsement is competent and binding upon the company as much so as if he was its general agent.

Wachter v. Phoenix Assur. Co., 132 Pa. St. 428, 19 Atl. Rep. 289.

RULE 52.

Broker Agent of Insured — Authority — Burden of Proof — May be Company's Agent — Evidence.

A broker is the agent of the assured as a general rule, his authority ceasing upon execution and delivery of the policy. If the broker undertakes to act outside of such employment the question for whom he acts depends upon the special circumstances of each case. If the assured or the company relies upon such acts to bind the other, the burden of proof rests upon the one who seeks to bind the other thereby to prove his authority. In absence of direct proof of actual authority, insured may establish agency of the company in the broker by showing what acts the company has permitted the broker to do, and that the act relied on ought reasonably to be inferred to be within the scope of the apparent authority implied from such acts. Thus a broker may become company's agent, notwithstanding the condition in the policy requiring written evidence of the authority.

American Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. Rep. 373, 26 Ins. L. J. 3, 34 Atl. Rep. 373; *Improved Match Co. v. Michigan Ins. Co.*, 122 Mich. 256, 80 N. W. Rep. 1088; *Russell v. Insurance Co.*, 80 Mich. 412, 45 N. W. Rep. 356; *Kausal v. Insurance Co.*, 31 Minn. 20, 16 N. W. Rep. 430; *Lumbermen's Ins. Co. v. Bell*, 166 Ill. 400, 45 N. E. Rep. 130, aff'g 63 Ill. App. 67; *Newark Ins. Co. v. Sammons*, 110 Ill. 166. And see *Wood*

v. Firemen's Ins. Co., 126 Mass. 316; *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. Rep. 309, 19 Ins. L. J. 979.

And see this volume, "Cancellation."

RULE 53.

Broker Cannot be Agent of Company Without Evidence of Authority.

A mere insurance broker cannot be converted into an agent of an insurance company, without evidence of some action on the part of the company, or of facts, from which a general authority to represent it might be fairly inferred.

Allen v. German-American Ins. Co., 123 N. Y. 6, 25 N. E. Rep. 309, 19 Ins. L. J. 979.

As to status of a broker as affected by statute, see Rules 97, 101, *et seq.*, notes, and Rules 54, *et seq.*

RULE 54.

Legal Definition of Broker — Payment of Compensation or Commission Does not Make Him Company's Agent — Authority.

An insurance broker is one who acts as a middleman between the assured and the company, and who solicits insurance from the public under no employment from any special company, but, having secured an order, he either places the insurance with the company selected by the insured, or, in absence of any selection by him, then with the company selected by such broker; and the fact that the broker receives his compensation or commission from the insurance company does not make him its agent;¹ the authority of a broker to obtain or place insurance for his principal does not authorize the placing of it in a mutual company.²

1. *Northrup v. Piza*, 43 App. Div. 284, 60 N. Y. Supp. 363, *aff'd*, 167 N. Y. 578, without opinion; *Arff v. Star Ins. Co.*, 125

N. Y. 63; *McGrath v. Home Ins. Co.*, 88 App. Div. 153, 84 N. Y. Supp. 374; *Sellers v. Commercial Ins. Co.*, 105 Ala. 282, 10 So. Rep. 798, 24 Ins. L. J. 354; *Parrish v. Rosebud Mining Co.*, 140 Cal. 635, 74 Pac. Rep. 312. And see *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. Rep. 453; *Security Ins. Co. v. Mette*, 27 Ill. App. 324.

2. *Annan v. Hill Union Brewery Co.*, 59 N. J. Eq. 414, 46 Atl. Rep. 563.

RULE 55.

Insured Responsible for Broker as His Agent — Evidence of Custom — Entries in Broker's Books — Conversations.

A broker, in the absence of evidence of authority from an insurance company, is the agent of the insured, for whose acts, misrepresentations, or concealment the latter is responsible;¹ the company is not bound by his knowledge,² nor can he waive condition requiring prepayment of the premium.³ Evidence of custom among brokers may be admissible, being competent at least to explain conduct of parties and how they regard a verbal arrangement and the acts necessary to be done to consummate it.⁴ So entries upon the broker's books may be competent as bearing upon the fact of mistake, and upon his credibility and that of his clerks.⁵ And conversations with him may become competent when there is other evidence from which it may be inferred that the substance of same was communicated to the company.⁶

1. *Turnbull v. Home Ins. Co.*, 83 Md. 312, 34 Atl. Rep. 875; *Armour v. Transatlantic Ins. Co.*, 90 N. Y. 450, 12 Ins. L. J. 345; *Fromherz v. Yankton Ins. Co.*, 7 S. D. 187, 63 N. W. Rep. 784, 24 Ins. L. J. 672; *Commonwealth Ins. Co. v. Fairbank Canning Co.*, 173 Mass. 161, 53 N. E. Rep. 373; *United Firemen's Ins. Co. v. Thomas*, 92 Fed. Rep. 127, 34 C. C. A. 240, 28 Ins. L. J. 500, aff'g, on rehearing, 82 Fed. Rep. 406, 27 C. C. A. 42; *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 118; *Seamans v. Knapp Co.*, 89 Wis. 171, 61 N. W. Rep. 757; *East Texas Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. Rep. 713; *Ed-*

wards *v. Home Ins. Co.*, 100 Mo. App. 695, 73 S. W. Rep. 881; *Home Ins. Co. v. Eakin*, 2 Tex. Ct. App. Civ. Cas. 665, 14 Ins. L. J. 569; *Fame Ins. Co. v. Thomas*, 10 Bradw. 545 (Ill.); *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502. And see *Continental Ins. Co. v. Allen*, 26 Ill. App. 576; *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. Rep. 309, 19 Ins. L. J. 979; *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85; *Carpenter v. American Ins. Co.*, 1 Story, 57 (U. S. Cir.); *Pelican Ins. Co. v. Smith*, 92 Ala. 428, 9 So. Rep. 327.

2. *Bradley v. German-American Ins. Co.*, 90 Mo. App. 369; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Fame Ins. Co. v. Mann*, 4 Bradw. 485 (Ill.); *Ben Franklin Ins. Co. v. Weary*, 4 Bradw. 74 (Ill.); *Devens v. Mechanics & Traders' Ins. Co.*, 83 N. Y. 168; *Royal Ins. Co. v. McCrea*, 8 Lea, 531 (Tenn.); *Fire Assoc. v. American Cement Co.*, Tex. Civ. App., 84 S. W. Rep. 1115; *East Texas Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. Rep. 713; *Mellen v. Hamilton Ins. Co.*, 5 Duer, 101, *aff'd*, 17 N. Y. 609; *Fire Assoc. v. Hagwood*, 82 Va. 342, 17 Ins. L. J. 876.

3. *Marland v. Royal Ins. Co.*, 71 Pa. St. 393.

As to broker's authority to cancel or substitute policies, see "Cancellation."

4. *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85.

5. *Standard Oil Co. v. Triumph Ins. Co.*, *supra*.

6. *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422. And see *Lycoming Ins. Co. v. Ward*, 90 Ill. 545; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Batchelor v. People's Ins. Co.*, 40 Conn. 56.

RULE 56.

Distinction Between Broker and Company's Soliciting Agent — Payment of Commission not Conclusive.

An insurance broker is a middleman between the parties, and for some purposes may be treated as the agent of both. He is ordinarily employed by the insured and must be distinguished from the ordinary insurance agent who solicits insurance under employment by the insurance company;¹ payment of commissions is not conclusive upon a question of capacity in which he works.²

1. *East St. Louis v. Brenner*, 59 Ill. App. 604. And see *Fame Ins. Co. v. Mann*, 4 Bradw. 485 (Ill.); *Allen v. German-*

American Ins. Co., 123 N. Y. 6, 25 N. E. Rep. 309, 19 Ins. L. J. 979; *Arff v. Star Ins. Co.*, 125 N. Y. 57, 25 N. E. Rep. 1073, 20 Ins. L. J. 112, 10 L. R. A. 609.

2. *Arff v. Star Ins. Co.*, *supra*; *McGrath v. Home Ins. Co.*, 88 App. Div. 153, 84 N. Y. Supp. 374.

And see Rules 50, 54.

RULE 57.

Broker May Make Delivery of Check for Premium Conditional.

A broker, in delivering a check for premiums to the insurance company or its agent, may make such delivery conditional upon acceptance of the insurance by the insured, and if the insured refuses to accept the policy, and the agent makes disposition of the check in violation of the condition and his agreement, he is personally liable to the broker for the amount of the check.

Dobson v. Jordan, 124 Mass. 542.

RULE 58.

Liability of Broker to Insured for Premiums — Right to Recover Same.

A broker is not liable to the insured for the amount of a premium misappropriated by the agent of the insurance company, when he has not acted negligently or in bad faith;¹ and when he acts as an agent for foreign companies in obtaining or placing insurance, he cannot recover the premium from the insured in his own name.²

1. *Marrian v. Robbins*, 102 App. Div. 214, 92 N. Y. Supp. 654.

2. *Cortis v. Van Derveer*, Misc. , 91 N. Y. Supp. 743.

RULE 59.

Broker May be Agent to Collect Premium — Question of Fact.

If a company delivers a policy to a broker with the understanding that he is to deliver it to the insured, collect the premium, retain his percentage, and remit the balance to the company, he may be regarded as the agent in fact of the company for the delivery of the policy and collection of the premium; as fully the agent of the company as if the secretary of the company had handed him the policy in the company's office with instructions to deliver and collect the premium. Hence payment of premium having been made to such broker, company will not be permitted to set up nonpayment of same to defeat the insurance. It is a question for the jury to determine.

Arthurholt v. Susquehanna Mut. Ins. Co., 159 Pa. St. 1, 28 Atl. Rep. 197, 23 Ins. L. J. 846; *Universal Ins. Co. v. Block*, 109 Pa. St. 535; *Riley v. Commonwealth Ins. Co.*, 110 Pa. St. 144; *Lebanon Ins. Co. v. Erb*, 112 Pa. St. 149, 16 Ins. L. J. 47; *Wytheville Ins. Co. v. Teiger*, 90 Va. 277, 18 S. E. Rep. 195; *Newark Ins. Co. v. Sammons*, 110 Ill. 166; *Gosch v. State Ins. Co.*, 44 Ill. App. 263; *Lycoming Ins. Co. v. Ward*, 90 Ill. 545; *Gaysville Mfg. Co. v. Phoenix Ins. Co.*, 67 N. H. 457, 36 Atl. Rep. 367; *Estes v. Home Manufacturers' Ins. Co.*, 67 N. H. 462, 33 Atl. Rep. 515; rehearing denied, 67 N. H. 597; *American Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. Rep. 373, 26 Ins. L. J. 3; *Cahill v. Andes Ins. Co.*, 5 Biss. 211 (U. S. Cir.); *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. Rep. 309, 19 Ins. L. J. 979. And see *Monitor Ins. Co. v. Young*, 111 Mass. 537; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Wood v. Firemen's Ins. Co.*, 126 Mass. 316.

RULE 60.

Evidence of Broker's Authority to Collect Premium — Question of Fact.

The single fact that an insurance company delivers a policy to the insured's broker does not constitute him its agent to collect the premium, unless the policy contain a clause acknowledging its receipt, in which case it might operate as evidence of implied authority to collect the amount of the premium. It is a question of fact, depending upon evidence in the particular case;¹ unless the policy, by express terms, fixes the status of the broker as the agent of the assured.²

1. *Citizens' Ins. Co. v. Swartz*, 21 Misc. 671, 47 N. Y. Supp. 1107. And see *Security Ins. Co. v. Mette*, 27 Ill. App. 324.

2. *Wilber v. Williamsburg City Ins. Co.*, 122 N. Y. 439, 25 N. E. Rep. 926.

The clause or condition in this case read: "If any broker or other person than the assured have procured this policy or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured and not of this company in any transaction relating to the insurance."

And see *Allen v. German-American Ins. Co.*, 123 N. Y. 6, 25 N. E. Rep. 309, 19 Ins. L. J. 979.

RULE 61.

Ratification by Insured of Broker's Act.

The insured may ratify the act of his broker or agent in obtaining a policy of insurance, even after a fire.

Larsen v. Thuringia Ins. Co., 208 Ill. 166, 70 N. E. Rep. 31, aff'g 108 Ill. App. 420; *Southern Cold Storage Co. v. Dechman*, Tex. Civ. App. , 73 S. W. Rep. 545; *Watson v. Southern Ins. Co.*, Miss. , 31 So. Rep. 904; *Atlantic Ins. Co. v. Carten*, 58 Md. 337; *Stilwell v. Staples*, 19 N. Y. 401; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606.

RULE 62.

Agent of Company Placing Surplus Insurance.

An agent of an insurance company in obtaining or placing surplus insurance in another company or agency than his own, acts as broker or agent of the insured, and his own company is not responsible to the insured for his failure to disclose facts within his knowledge to such other company, which has the effect to make void the latter's policy.

Bateman v. Lumberman's Ins. Co., 189 Pa. St. 465, 42 Atl. Rep. 184, 28 Ins. L. J. 159; *Freedman v. Providence-Washington Ins. Co.*, 182 Pa. St. 64, 37 Atl. Rep. 909; *Sellers v. Commercial Ins. Co.*, 105 Ala. 282, 16 So. Rep. 798, 24 Ins. L. J. 354; *Edwards v. Home Ins. Co.*, 100 Mo. App. 695, 73 S. W. Rep. 881; *Merchants' Ins. Co. v. Union Ins. Co.*, 162 Ill. 173, 44 N. E. Rep. 409, rev'g 58 Ill. App. 611; *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502.

It was held in *Ahlberg v. German Ins. Co.*, 94 Mich. 259, 53 N. W. Rep. 1102, 22 Ins. L. J. 307, that the knowledge of such an agent bound the agent of the company with whom the surplus line was placed.

And to same effect was *Union Ins. Co. v. Murphy*, 15 Ins. L. J. 548 (Pa.); *Mullin v. Vermont Ins. Co.*, 15 Ins. L. J. 561 (Vt.); *May v. Western Assur. Co.*, 27 Fed. Rep. 260; *Teutonia Ins. Co. v. Ewing*, 90 Fed. Rep. 217, 32 C. C. A. 583, 28 Ins. L. J. 282; *McGraw v. Germania Ins. Co.*, 54 Mich. 145.

And in *Miller v. Scottish Union & Nat. Ins. Co.*, 101 Mich. 49, 59 N. W. Rep. 439, 23 Ins. L. J. 725, it was held that the insured was not bound by a verbal notice to the agent, who placed the surplus line, of want of authority in the agent to make a certain indorsement upon the policy.

In *McElroy v. British American Assur. Co.*, 88 Fed. Rep. 863, it was held that an agent of one company, placing a surplus line of insurance with another company, was not the agent of latter so as to charge it with his knowledge of other insurance.

Whether an agent of one company, in placing or obtaining excess or surplus insurance from agents of other companies, acts simply as a broker or agent of the insured, or so far as the insured is concerned is not his agent but the agent of such other companies, doubtless depends upon the facts of the particular

case, as to whether or not he is clothed by such other agents or companies with apparent authority to represent them, either specially, or in usual course of business, or otherwise, the insured having no notice or knowledge of any limitation on his apparent authority (*Virginia F. & M. Ins. Co. v. Cummings*, Tex. Civ. App. , 78 S. W. Rep. 716). Furthermore the legal status of such an agent may be fixed by a statute making him the agent of such other companies because, as matter of fact, he "*aids in the transaction*" of their insurance business.

Wisconsin Central Ry. Co. v. Phoenix Ins. Co., Wis. , 101 N. W. Rep. 703; *Schomer v. Hekla Ins. Co.*, 50 Wis. 575, 10 Ins. L. J. 306; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 11 Ins. L. J. 126; *Welch v. Fire Assoc.*, 120 Wis. 456, 98 N. W. Rep. 227; *Pollock v. German Ins. Co.*, 127 Mich. 460, 86 N. W. Rep. 1017, 93 N. W. Rep. 436; *Bliss v. Potomac Ins. Co.*, 134 Mich. 212, 95 N. W. Rep. 1083.

The status or scope of authority of such an agent may be a question of fact, proper to be determined by a jury.

Norris v. Hartford Ins. Co., 57 S. C. 358, 35 S. E. Rep. 572.

The mere sharing or allowance of commissions does not establish agency.

Parrish v. Rosebud Mining Co., 140 Cal. 635, 74 Pac. Rep. 312.

As affecting a question of cancellation, see "Cancellation."

RULE 63.

Opinion and Representation by Broker—Question of Fact.

A false representation cannot be based upon a mere expression of an opinion by a broker. Whether a statement or representation by a broker is an expression of opinion or a positive statement of a fact is a question proper to be determined by a jury.

Standard Oil Co. v. Amazon Ins. Co., 14 Hun, 619, aff'd, 79 N. Y. 506.

RULE 64.

Duty of Broker in Procuring or Maintaining Insurance—Personal Liability.

A broker or agent in procuring or maintaining insurance is legally bound to exercise reasonable care,

diligence, and skill, and is personally liable to his principal or the insured for the consequences or damages resulting from the negligent performance of such duty;¹ so he is liable when he violates his instructions to the prejudice of his principal.²

1. *Milliken v. Woodward*, 64 N. J. L. 444, 45 Atl. Rep. 796; *Backus v. Ames*, 79 Minn. 145, 81 N. W. Rep. 766; *Criswell v. Riley*, 5 Ind. App. 503, 32 N. E. Rep. 814, aff'g 30 N. E. Rep. 1101, 21 Ins. L. J. 763; *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 432; *Keane v. Branden*, 12 La. Ann. 20. And see *Wilkinson v. Coverdale*, 1 Esp. 75 (Eng.); *Park v. Hammond*, 4 Campb. 344 (Eng.); *Morris v. Summerl*, 2 Wash. 203 (U. S. Cir.); *Ela v. French*, 11 N. H. 356; *Arrott v. Walker*, 118 Pa. St. 249, 12 Atl. Rep. 280; *Sawyer v. Mayhew*, 51 Me. 398.

2. *Martin v. Tradesman's Ins. Co.*, 101 N. Y. 498.

RULE 65.

Responsibility of Broker — Standard of Care — Question of Fact — Presumption — Evidence.

A broker or agent by holding himself out as engaged in the business of effecting insurance is assumed to have the requisite knowledge, information, ability, and skill to accomplish such purpose in behalf of those who become his patrons. While he is not an insurer of the adequacy in financial condition of companies whose policies are obtained through his advice and agency, in whatever he does in that respect, he undertakes to use reasonable care, skill, and judgment, with a view to the security or indemnity for which insurance is sought. Hence he may be personally liable for the negligent performance of such duty in obtaining policies from insolvent or irresponsible companies, not authorized to do business in the State;¹ the question of negligence is a mixed one of law and

fact, and cannot be treated as one of law only when the evidence admits of any conflicting inference.² There is no presumption that an insurance company is irresponsible or insolvent from the mere fact that it is not admitted or authorized to transact business.³ The obtaining of insurance in a company not admitted, without any inquiry or care, is evidence of want of due care, without regard to the fact whether the company is actually insolvent or not.⁴

1. *Burges v. Jackson*, 18 App. Div. 296, 46 N. Y. Supp. 326, aff'd, 162 N. Y. 632, on opinion below; *Shepard v. Davis*, 42 App. Div. 462, 59 N. Y. Supp. 456; *Landusky v. Beirne*, 80 App. Div. 272, 80 N. Y. Supp. 238, aff'd, 178 N. Y. 551, on opinion below; *Price v. Garvin*, Tex. Civ. App. , 69 S. W. Rep. 985; *Hartman v. Hollowell*, Iowa, , 102 N. W. Rep. 524; *Haw Brick Co. v. Hogsett*, 73 Mo. App. 432; *Morton v. Hart*, 88 Tenn. 427, 19 Ins. L. J. 347; *Mallery v. Frye*, 21 App. D. C. 105; *Latham Mercantile Co. v. Harrod*, Kans. , 81 Pac. Rep. 214. And see *Gettins v. Scudder*, 71 Ill. 86; *Vann v. Downing*, 10 Pa. Co. Ct. 59.

2. *Burges v. Jackson*, *supra*.

3. *Jones v. Horn*, 104 Mo. App. 705, 78 S. W. Rep. 638.

4. *Mallery v. Frye*, 21 App. D. C. 105.

RULE 66.

When Broker or Agent not Personally Liable.

A broker or agent may not be personally liable for placing the insurance in nonadmitted, irresponsible companies when the insured knowingly participates in the negotiation and action of the agent, and is not misled or deceived.

Webster v. Ferguson, Minn. , 102 N. W. Rep. 213.

RULE 67.

Broker Authorized to Collect Unearned Premium.

When the insured, by agreement, authorizes his broker to collect the unearned premium on cancella-

tion of a policy by the company, the insured has no claim for the same as against the company when paid to the broker.

Miller v. Home Ins. Co., N. J. L. , 58 Atl. Rep. 98.

RULE 68.

Waiver or Estoppel by General Agents — Restrictions upon Authority in Policy not Binding Prior to Delivery of Policy.

General agents may waive stipulations and provisions contained in the policy at time of its inception as a contract or the company is estopped by delivering it with knowledge of all the existing facts and receiving the premium;¹ restrictions upon authority of an agent do not bind the insured prior to delivery of the policy.² This rule rests upon estoppel rather than waiver,³ and is limited to knowledge of existing facts; a statement by insured as to his intention in the future is inoperative as a waiver or estoppel.⁴

1. *Wood v. American Ins. Co.*, 149 N. Y. 382, 44 N. E. Rep. 80; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254, 21 Ins. L. J. 455; *Bennett v. North British & M. Ins. Co.*, 81 N. Y. 273; *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. Rep. 463; *Manufacturers & Merchants' Ins. Co. v. Armstrong*, 145 Ill. 469, 34 N. E. Rep. 553; *Continental Ins. Co. v. Cummings*, Tex. , 81 S. W. Rep. 705; *Schultz v. Caledonia Ins. Co.*, 94 Wis. 42, 68 N. W. Rep. 414; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. Rep. 29, 27 Ins. L. J. 406; *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. Rep. 779; *Winans v. Allemania Ins. Co.*, 38 Wis. 342; *Hornthal v. Western Ins. Co.*, 88 N. C. 71, 13 Ins. L. J. 287; *Rivara v. Queens Ins. Co.*, 62 Miss. 720; *German-American Ins. Co. v. Yeagley*, Ind. , 71 N. E. Rep. 897; *Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. Rep. 137; *Brink v. Merchants' Ins. Co.*, 49 Vt. 442; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Emery v. Piscataqua Ins. Co.*, 52 Me. 322. And see *Hagan v. Merchants' Ins. Co.*, 81 Iowa, 321; *St. Paul F. &*

M. Ins. Co. v. Shaver, 76 Iowa, 282, 41 N. W. Rep. 19; *McCabe v. Dutchess County Ins. Co.*, 14 Hun, 599 (N. Y.); *Peoria F. & M. Ins. Co. v. Hall*, 12 Mich. 202; *Kitchen v. Hartford Ins. Co.*, 57 Mich. 135, 23 N. W. Rep. 616; *Williamson v. New Orleans Assoc.*, 84 Ala. 106, 4 So. Rep. 36; *Kruger v. Western Assur. Co.*, 72 Cal. 91, 13 Pac. Rep. 156.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 8, 12, 16.

2. *Crouse v. Insurance Co.*, 79 Mich. 249; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101.

And see Rule 4, note .

3. *Welch v. Fire Assoc.*, 120 Wis. 456, 98 N. W. Rep. 227.

As to the distinction between "waiver" and "estoppel," see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 6.

4. *Worachek v. New Denmark Ins. Co.*, 102 Wis. 81, 78 N. W. Rep. 165.

See also Vol. 1, "Waiver," Rule 20.

RULE 69.

An Insurance Company Cannot Prohibit Itself from Making a Waiver.

Any provision in an insurance policy to the effect that the company itself cannot waive is inoperative and void, as, for instance, when it prohibits its officers, agents, and representatives, without any exception, from making a waiver.

Wilkins v. State Ins. Co., 43 Minn. 177, 45 N. W. Rep. 1, 20 Ins. L. J. 478; *Lamberton v. Connecticut Ins. Co.*, 39 Minn. 129, 18 Ins. L. J. 473. And see *Morrison v. North American Ins. Co.*, 69 Tex. 353, 6 S. W. Rep. 605; *Barnard v. National Ins. Co.*, 38 Mo. App. 106; *Maryland Ins. Co. v. Gusdorf*, 43 Md. 506; *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5; *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 30 N. E. Rep. 254, 21 Ins. L. J. 455; *Davis v. Farmers' Ins. Co.*, 134 N. C. 60, 45 S. E. Rep. 955.

RULE 70.

Insured Bound by Limitations upon Agent's Authority in an Accepted Policy — No Oral Waiver After Issue.

The insured is bound by limitations upon an agent's power and authority contained in an accepted policy,

and when that limits such power and authority to consents in writing, or by indorsement, and there is no evidence enlarging or changing such power or authority, there can be no oral waiver or consent after issue and acceptance of the policy.

Quinlan v. Providence-Washington Ins. Co., 133 N. Y. 356, 31 N. E. Rep. 31, 21 Ins. L. J. 650; *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28, 31 N. E. Rep. 265, 21 Ins. L. J. 83; *Messelback v. Norman*, 122 N. Y. 578, 22 N. E. Rep. 34; *Hill v. London Assur. Co.*, 26 Abb. N. C. 203, 12 N. Y. Supp. 86; *Knowles v. American Ins. Co.*, 66 Hun, 220, 21 N. Y. Supp. 50, *aff'd*, 142 N. Y. 641, on opinion below; *Meigs v. London Assur. Co.*, 126 Fed. Rep. 781; *Egan v. Westchester Ins. Co.*, 28 Oreg. 289, 42 Pac. Rep. 611, 25 Ins. L. J. 361; *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. Rep. 463; *Oshkosh Match Works v. Manchester Assur. Co.*, 92 Wis. 510, 66 N. W. Rep. 525; *Bourgeois v. Mutual Ins. Co.*, 86 Wis. 402, 57 N. W. Rep. 38, 23 Ins. L. J. 299; *Warren v. Phoenix Ins. Co.*, 19 N. Y. Supp. 990; *Wolf v. Dwelling-House Ins. Co.*, 75 Mo. App. 337; *Wilkins v. State Ins. Co.*, 43 Minn. 177, 45 N. W. Rep. 1, 20 Ins. L. J. 478; *Goldin v. Northern Ins. Co.*, 46 Minn. 471; *First Nat. Bank v. Lancashire Ins. Co.*, 62 Tex. 461, 14 Ins. L. J. 278; *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116, 3 N. E. Rep. 884, 16 Ins. L. J. 330; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101; *Ritchie Co. Bank v. Firemen's Ins. Co.*, W. Va. , 47 S. E. Rep. 94; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; *German Ins. Co. v. Heideck*, 30 Nebr. 288, 46 N. W. Rep. 481, 20 Ins. L. J. 206; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. Rep. 34; *Burlington Ins. Co. v. Gibbons*, 43 Kans. 15, 22 Pac. Rep. 1010, 19 Ins. L. J. 546. And see *Hartford Ins. Co. v. Webster*, 69 Ill. 392; *Meyers v. Germania Ins. Co.*, 27 La. Ann. 63; *Smith v. Continental Ins. Co.*, 6 Dak. 433, 43 N. W. Rep. 810; *Allemania Ins. Co. v. Hurd*, 37 Mich. 11; *Weidert v. State Ins. Co.*, 19 Oreg. 261, 24 Pac. Rep. 242; *Johnson v. Ætna Ins. Co.*, Ga. , 51 S. E. Rep. 339.

And see Vol. 1, Fire Insurance as a Valid Contract, "Waiver," Rule 27.

In *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, the New York Court of Appeals says: "The powers possessed by agents of insurance companies, like those of agents of any other corporations, or of an individual principal, are to be

interpreted in accordance with the general law of agency. No other or different rule is to be applied to a contract of insurance, than is applied to other contracts. The agent of an insurance company possesses such powers and such powers only as have been conferred verbally or by the instrument of authorization, or such as third persons have a right to assume that he possesses. Where the act or representation of the agent of an insurance company is alleged as the act of the principal, and, therefore, binding upon the latter, the test of the liability of the principal is the same as in other cases of agency. No principle is better settled in the law, nor is there any founded on more obvious justice than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other. The limitations upon the authority of Kelsey were written on the face of the policy. It declared that 'no officer, agent, or representative of the company should have power to waive any provision or condition' embraced in the printed and authorized policy, but power is given to agents to waive added provisions or conditions, provided such waiver is written upon or attached to the policy. Where a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority, and the consent or act of the agent not so indorsed is void. The conditions violated in this case were contained in the authorized blank, and as to these the agent had no power in any manner, in writing, or otherwise, to waive them. In determining the question of liability in this case it is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limitations of the power of Kelsey. The conditions and limitations were a part of the contract and he was bound to take notice of them, and is not excused upon the plea that he omitted to acquaint himself with the provisions of the policy, and his arrangement with Kelsey to take charge of his insurance interests was a matter with which the defendant had no concern. The act (chap. 486, of the Laws of 1886) providing for a uniform policy known as the standard policy, and which makes its use compulsory upon insurance companies, marks a most important and useful advance in legislation relating to contracts of insurance. The practice which prevailed be-

fore this enactment, whereby each company prescribed the form of its contract, led to great diversity in the provisions and conditions of insurance policies and frequently to great abuse. Parties taking insurance were often misled by unusual clauses or obscure phrases concealed in a mass of verbiage, and often so printed as almost to elude discovery. Unconscionable defenses based upon such conditions were not infrequent, and courts seem sometimes to have been embarrassed in the attempt to reconcile the claims of justice with the law of contracts. Under the law of 1886 companies are not permitted to insert conditions in policies at their will. The policies they now issue must be uniform in their provisions, arrangement, and type. Persons seeking insurance will come to understand to a greater extent than heretofore the contract into which they enter. Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures, the court may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company."

And in *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5, 9, the same court says: "Insurance corporations organized under the laws of one State may, and often do, carry on their business in other States. They cannot conduct their business except through agents, and it is a reasonable and just inference that agents intrusted with the power to make original contracts of insurance have also the power to modify them as occasions and circumstances require. Nor would a restriction upon the power of an agent, not known to persons dealing with him, limiting the usual powers possessed by agents of the same character, exempt the principal from responsibility for his acts and contracts, which were within the ordinary scope of the business intrusted

to him, although he acted in violation of special instructions. The company could itself dispense with this condition by oral consent, as well as by writing (*Trustees, etc. v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305); and Carpenter, unless specially restricted, would have possessed, in this respect, the power of the principal. But the policy contains the provision that no agent of the company shall be deemed to have waived any of the terms and conditions of the policy, unless such waiver is indorsed on the policy in writing. This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions, except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. The provision was designed to protect the company against collusion and fraud, and the dangers and uncertainty of oral testimony. The case seems to be a hard one for the plaintiff; but courts cannot make contracts for parties, nor can they dispense with their provisions. The authority of an agent is not only that conferred upon him by his commission, but also as to third persons that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons, who believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain loss if the act was not considered that of the principal. (*Clark v. Metropolitan Bank*, 3 Duer, 248; *Story on Agency*, § 127; *Howard v. Braithwaite*, 1 Ves. & B. 209; *Stainer v. Tysen*, 3 Hill, 279; *Barnard v. Wheeler*, 24 Me. 279.) The doctrine is established to prevent fraud, and proceeds also upon the ground that when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury. If, however, a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is in excess of or an abuse of the authority actually conferred, then manifestly the principal is not bound, and it is immaterial whether the agent is a general or special one. The principal has the unqualified right, as between himself and the agent, to define and

limit the agent's authority; to invest him with large or with restricted powers only. The agent, as we have seen, may sometimes bind the principal, although he transgresses his instructions, provided his apparent authority extends to the act done, but this is a rule of protection only."

In *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28, a condition required written consent to be indorsed in specified events and further provided "that this policy is made and accepted upon the above express conditions, no part whereof can be waived, except in writing, signed by the secretary," and the court says, page 32 * * * "it was the duty of the insured to read his contract and conform to its provisions. By accepting the policy, he assented to a limitation of the power of the agent. Having thus agreed he was bound to know the extent of the limitation, and act accordingly."

In *Steen v. Niagara Ins. Co.*, 89 N. Y. 316, where it was held that the company was bound by an oral consent or construction of its agent after issue of the policy, there was no restriction upon the power of the agent.

And so in *Goldwater v. Liverpool, L. & G. Ins. Co.*, 39 Hun, 176, aff'd, 109 N. Y. 618, on opinion below, it was held that the policy did not restrict or limit the power or authority of a general agent.

RULE 71.

Notwithstanding Limitations upon Authority in Policy General Agent May Estop the Company After its Issue — Mere Knowledge of Agent Insufficient.

Notwithstanding limitations upon an agent's authority contained in an accepted policy, if he is a general agent authorized to make contracts of insurance and issue policies, he may orally consent to changes or modifications in the policy upon which the insured relies which become binding on the company as an estoppel;¹ mere knowledge of an agent is not sufficient.²

1. *Concordia Ins. Co. v. Johnson*, 4 Kans. App. 7, 45 Pac. Rep. 722; *Queen Ins. Co. v. Straughan*, Kans. , 78 Pac. Rep. 447; *German Ins. Co. v. Gray*, 43 Kans. 497, 23 Pac. Rep. 637; *Ætna Ins. Co. v. Eastman*, Tex. Civ. App. , 80

S. W. Rep. 255; *Fire Assoc. v. Masterson*, Tex. Civ. App., 83 S. W. Rep. 49; *Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co.*, Iowa, , 101 N. W. Rep. 749; *Phoenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. Rep. 990; *Niagara Ins. Co. v. Brown*, 123 Ill. 356; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. Rep. 959; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. Rep. 428; *Burnham v. Greenwich Ins. Co.*, 63 Mo. App. 85; *Parsons v. Knoxville Ins. Co.*, 132 Mo. 583, 31 S. W. Rep. 117; *Mattingly v. Springfield F. & M. Ins. Co.*, Ky., , 83 S. W. Rep. 577; *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, 84 S. W. Rep. 551 (Ky.); *Continental Ins. Co. v. Thomason*, 84 S. W. Rep. 546 (Ky.). And see *Crane v. City Ins. Co.*, 3 Fed. Rep. 558; *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418, 10 Ins. L. J. 606; *Westchester Ins. Co. v. Earle*, 33 Mich. 143; *Morrison v. North American Ins. Co.*, 69 Tex. 353, 6 S. W. Rep. 605; *McArthur v. Home Ins. Co.*, 73 Iowa, 336, 35 N. W. Rep. 430.

2. *Concordia Ins. Co. v. Johnson*, 4 Kans. App. 7, 45 Pac. Rep. 722; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *Robinson v. Fire Assoc.*, 63 Mich. 90.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 28.

In *Mattingly v. Springfield F. & M. Ins. Co.*, Ky., , 83 S. W. Rep. 577, the Kentucky Court of Appeals says: "A contract of insurance may be oral as well as in writing, and although it is in writing, like any other contract, it may be modified by a subsequent agreement between the parties. The fact that the contract provides that no subsequent agreement shall be valid unless in writing and indorsed on the policy does not change the rule, for this part of the contract stands like any other part of it, and may be changed by a subsequent oral agreement, just as any other provision of the contract may be subsequently modified." See Rule 70.

See Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 2.

RULE 72.

Limitation of Authority in Policy not Conclusive — Effect of Conduct and Course of Business.

Notwithstanding express limitations of power in the agent by the terms of the policy, an insurance company, just like any individual who has so stipulated

in the power appointing an agent, may, afterward, by another writing, or by parol, modify or enlarge the power of the agent, or by its conduct and course of business with the assured be estopped to deny that the agent had the power to waive forfeitures, proofs of loss, and the like, notwithstanding the limitations of power contained in the policy or power in his appointment. The responsibility of the principal for the acts of the agent is measured not alone by the terms of the original power conferred on the agent, but also by the subsequent power, written or parol, expressly conferred, or such as is necessarily implied from the conduct of the principal and of his agent with his knowledge and from their course of business with third persons, and which conduct and course of business estop the principal from denying the power of the agent to do the particular act relied on, albeit the power to do that act was not conferred, but on the contrary, was expressly denied to the agent by the original contract;¹ the authority to issue policies is not an absolute or only test of power to waive a forfeiture.²

1. *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. Rep. 889. And see *Franklin v. Atlantic Ins. Co.*, 42 Mo. 456.

2. *American Ins. Co. v. Walston*, 111 Ill. App. 133.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 9, *et seq.*

RULE 73.

Notice to Agent as an Element of Estoppel—Conduct of Company.

While an agent has no authority to make an oral contract with the insured waiving the express terms of the policy, that does not prevent the fact of notice to him becoming evidence of waiver or estoppel in

connection with the conduct of the company in treating policy as a valid one, and inducing insured to act on such belief.

Hartford Ins. Co. v. Landfare, 63 Nebr. 559, 88 N. W. Rep. 779.

See also "Cancellation."

RULE 74.

Letters as Evidence of Waiver.

Letters written by the officers or managers of an insurance company to its own agent do not become evidence of waiver when their contents are neither communicated to or acted upon by the assured;¹ and letters passing between the insured and his agents are not competent evidence against the company.²

1. Everett v. London & Lancashire Ins. Co., 142 Pa. St. 332, 21 Atl. Rep. 819.

2. Insurance Co. N. A. v. Guardiola, 129 U. S. 642, 18 Ins. L. J. 810.

RULE 75.

Fraud and Collusion as Affecting Estoppel.

When there is fraud and collusion between the agent of the insurance company and the insured, the knowledge of the former does not operate as evidence of estoppel as against the company.

Rockford Ins. Co. v. Nelson, 65 Ill. 415.

RULE 76.

No Waiver by Delivery of Policy After Fire.

Waiver cannot be predicated upon a delivery of the policy by an agent to the insured after a fire, when

there is a sufficient contract of insurance when the fire occurs, and the agent holds the policy for the insured.

Young v. St. Paul F. & M. Ins. Co., 68 S. C. 387, 47 S. E. Rep. 681.

RULE 77.

When Company Bound by Knowledge of its Agent when Policy Issues.

Knowledge of a fact acquired by one of company's agents, a partnership, not while acting for it, but casually while attending to his own affairs, to make it the knowledge of the company at the time a policy is subsequently issued, it must be shown that the agent who issued it had such knowledge or information present in his mind;¹ an insurance company is not chargeable with knowledge of facts acquired by its agent in a business other than that of the company.² Knowledge must be communicated to him as agent of the company, and not by mere rumors, or gossip on street corners.³ But when communicated to him as agent of the company, it binds the latter when a policy is subsequently issued in continuance or renewal; the fact that knowledge was acquired prior to time of issue of last policy is immaterial.⁴

1. *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. Rep. 464, 27 Ins. L. J. 584.

2. *German Ins. Co. v. Cain*, 37 S. W. Rep. 657 (Tex. Civ. App.).

3. *Keenan v. Missouri Ins. Co.*, 12 Iowa, 126. And see *Sykes v. Perry County Ins. Co.*, 34 Pa. St. 79.

4. *Broadhead v. Lycoming Ins. Co.*, 23 Hun, 397. And see Vol. 1, "Waiver," Rule 17.

RULE 78.

Evidence as to Knowledge of Agent.

Evidence that an agent had knowledge of a fact at a certain time is evidence that he had the same knowledge a short time thereafter;¹ but such knowledge will not be inferred from an uncertain, casual conversation with the agent two years before the policy issues.²

1. *Gandy v. Orient Ins. Co.*, 52 S. C. 224, 29 S. E. Rep. 655, 27 Ins. L. J. 575.

2. *Virginia F. & M. Ins. Co. v. Cummings*, Tex. Civ. App. , 78 S. W. Rep. 716.

RULE 79.

Knowledge of Agent as Affected by Time.

If knowledge of a material fact be acquired by an agent previous to the transaction wherein he acts for his principal, and the fact is in the mind of the agent when he performs the act or transacts the business in question, then as to all parties concerned, it is, in legal effect, the same as if the information was communicated to the agent at the time;¹ and if the fact is recollected by him, and is present in his mind at the time of the transaction in question, it is not material when or how the knowledge was obtained.²

1. *Woodward v. Republic Ins. Co.*, 32 Hun, 365.

2. *Wilson v. Minnesota Farmers' Ins. Co.*, 36 Minn. 112, 16 Ins. L. J. 600. And see *Stennett v. Pennsylvania Ins. Co.*, 68 Iowa, 674; *Stevens v. Queen Ins. Co.*, 81 Wis. 335, 51 N. W. Rep. 555, 21 Ins. L. J. 443.

RULE 80.

Personal Liability of Company's Agent—Effect of Noncompliance with Statute on Liability for Premiums.

An insurance agent is personally responsible to his principal or the insurance company for the consequences resulting from negligent performance of his duty to obey instructions;¹ or for failure to cancel a policy, or to reduce insurance as instructed.² He cannot plead the company's noncompliance with a statute as to admission or authority to transact business, to escape liability for premiums collected.³

1. *Franklin Ins. Co. v. Bradford*, 201 Pa. St. 32, 50 Atl. Rep. 286; *Northern Assur. Co. v. Borgelt*, Nebr. , 93 N. W. Rep. 226; *Mechanics & Traders' Ins. Co. v. Rion*, 62 S. W. Rep. 44, aff'd orally by the Tennessee Supreme Court, 62 S. W. Rep. 50; *Continental Ins. Co. v. Clark*, Iowa, , 100 N. W. Rep. 524; *State Ins. Co. v. Jamison*, 79 Iowa, 245. And see *Kraber v. Union Ins. Co.*, 129 Pa. St. 8, 18 Atl. Rep. 491; *Martin v. Tradesman's Ins. Co.*, 101 N. Y. 498.

2. *Germania Ins. Co. v. Harraden*, 90 Ill. App. 250; *British American Ins. Co. v. Wilson*, Conn. , 60 Atl. Rep. 293; *Halsey v. Adams*, 63 N. J. L. 330, 43 Atl. Rep. 708, 28 Ins. L. J. 734; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290, 13 Ins. L. J. 768; *Washington Ins. Co. v. Chesbro*, 35 Fed. Rep. 477; *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513, 16 Ins. L. J. 75; *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409, 31 N. W. Rep. 454, 16 Ins. L. J. 301.

3. *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350, 34 So. Rep. 1012.

RULE 81.

Instructions to Agent Should be Clear and Unambiguous.

Instructions to an agent should be expressed in clear, explicit, unambiguous language. When the language used is fairly susceptible of different interpretations, and the agent is in fact misled and adopts and follows one, while the principal intended another,

the principal will be bound, and the agent will be exonerated.

Winne v. Niagara Ins. Co., 91 N. Y. 185.

RULE 82.

Local Agent not Liable for Fraudulent Act of Clerk or Solicitor.

A local agent authorized to countersign and issue policies is not liable to the insurance company for the fraudulent act of a clerk or solicitor of insurance in the office of the former, in fraudulently signing or using a policy of the company without the knowledge of either.

Bradford v. Hanover Ins. Co., 102 Fed. Rep. 48, 43 C. C. A. 310.

RULE 83.

Company's Agent no Power to Bind Company by Contract to Insure in the Future — May be Bound Personally.

A general agent with usual commission or written authority under the New York standard form has no power to make a binding contract when he issues a policy that he will keep the same renewed or in force. Neither such a commission nor the policy contemplates or authorizes an executory oral contract to insure property in the future. Such a promise may be the individual contract of the agent, but not of the company;¹ and to bind the agent personally there must be all the elements of a contract, such as acceptance of a distinct proposition.²

1. *Shank v. Glens Falls Ins. Co.*, 4 App. Div. 516, 40 N. Y. Supp. 14; *Wood v. Prussian Nat. Ins. Co.*, 99 Wis. 497. And see *Rounsaville v. North Carolina Home Ins. Co.*, N. C., 50 S. E. Rep. 619.

2. *Prescott v. Jones*, 69 N. H. 305, 41 Atl. Rep. 352.

RULE 84.

Personal Liability of Agent under Statute.

Under the Pennsylvania statute an insurance agent, who acts directly or indirectly in obtaining a policy from a foreign company not legally authorized to transact business within the State is personally liable for a loss thereon; such liability is complete when loss occurs, and is payable upon proof thereof to him.¹ And the fact that the policy was obtained from a broker and not directly from the company is immaterial.² The limitation clause in the policy has no application to such a cause of action.³ The statute extends only to property within the State.⁴

1. *McBride v. Rinard*, 172 Pa. St. 542, 33 Atl. Rep. 750.

2. *Lauck v. Myers*, 5 Pa. Dist. Rep. 377.

3. *Adler-Weinburger Co. v. Rothschild & Co.*, 123 Fed. Rep. 145.

4. *Rothschild v. Adler-Weinberger Co.*, 130 Fed. Rep. 866, 65 C. C. A. 350, rev'g 123 Fed. Rep. 145.

RULE 85.

Agent's Personal Responsibility to Insured for Misrepresentation.

Company's agent may be personally liable to the insured when latter's suit against the company fails in consequence of representations by such agent in excess of his authority, upon which the insured relied.

Kroeger v. Pitcairn, 101 Pa. St. 311.

RULE 86.

As Between Agent and Company Damages on Breach of Contract of Agency.

In an action by an agent against his company for a breach of a contract of agency, prospective profits of

the contract may be considered in question of the damages;¹ but not when the contract with the agent in terms provides that termination of the contract whether brought about by either party shall be without any liability on the part of the insurance company beyond the commissions actually earned at the close of the agency.²

1. *Stowell v. Manufacturers & Merchants' Ins. Co.*, 61 App. Div. 58, 70 N. Y. Supp. 80.

2. *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298, rev'g 20 App. Div. 188.

RULE 87.

Duration of Agency.

When there is no time specified for the duration of an agency, it is terminable at the will of the insurance company.

Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. Rep. 359.

RULE 88.

Right of Agent After Termination of Agency.

When an agent is under no contractual restraint and no violation of business secrets reposed in him by reason of his agency is involved, he has the right, after the termination of his agency, to influence the policyholders of his former principal, to forfeit or transfer to other companies their policies, whether such policies were the fruits of such agent's efforts while in his former employment or otherwise.

American Ins. Co. v. France, 111 Ill. App. 382.
And see this volume, "Cancellation."

RULE 89.

Property Rights in Expirations.

Insurance companies represented by a local agent do not have property rights in the renewal of policies by their customers after their expiration, and are not the owners of an expiration register kept by such agent, nor entitled to its possession, nor can the agent be restrained from making use in any lawful manner of the information derived from such expiration register in soliciting the insured to continue their insurance in other companies, provided he does not induce improper cancellations;¹ while expirations may be a valuable asset in the business of the agent, in a suit by the company to recover premiums collected, he cannot set off an amount as adjusted between himself and a prior agent on purchase of good-will and expirations.²

1. *National Ins. Co. v. Sullard*, 97 App. Div. 233, 89 N. Y. Supp. 934.

2. *St. Paul F. & M. Ins. Co. v. Ulbright*, 48 S. W. Rep. 131, aff'd orally by Tennessee Supreme Court, 48 S. W. Rep. 133.

RULE 90.

When Authority of Agent Question of Fact or Law.

If the authority of an agent and its extent is not evidenced by a written instrument but rests in parol, and is a matter of disputed fact, then it becomes a question of fact to be determined by a jury and is not a question of law for the court.

Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 So. Rep. 46, 24 Ins. L. J. 447; *Lewis v. Guardian Assur. Co.*, 93 App. Div. 157, 87 N. Y. Supp. 525; *Nicol v. American Ins. Co.*, 3

Woodb. & Min. 529 (U. S. Cir.); *Hough v. City Ins. Co.*, 29 Conn. 10; *Keenan v. Missouri State Ins. Co.*, 12 Iowa, 126; *Dickinson v. Mississippi Valley Ins. Co.*, 41 Iowa, 286. And see *Roche v. Ladd*, 1 Allen, 436 (Mass.); *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

RULE 91.

Authority of Agent Question of Fact.

When the evidence tends to show that the agent is acting within the scope of his real or apparent authority, and the insured is ignorant of any limitations upon such authority, the authority of the agent is a question for the jury;¹ thus the authority of a soliciting agent may become a question of fact proper to be determined by a jury.²

1. *Lewis v. Guardian Assur. Co.*, 181 N. Y. 392, 74 N. E. Rep. 224, aff'g 93 App. Div. 157; *Hardwick v. State Ins. Co.*, 20 Oreg. 547, 31 Pac. Rep. 656, 22 Ins. L. J. 262; *John R. Davis Lumber Co. v. Home Ins. Co.*, 95 Wis. 542, 70 N. W. Rep. 59; *Cave v. Home Ins. Co.*, 57 S. C. 347, 35 S. E. Rep. 577; *Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213, 59 N. E. Rep. 12; *Frost v. North British & M. Ins. Co.*, Vt. , 60 Atl. Rep. 803.

2. *Hahn v. Guardian Assur. Co.*, 23 Oreg. 576, 32 Pac. Rep. 683; *Firemen's Ins. Co. v. Horten*, 170 Ill. 258, 48 N. E. Rep. 955, aff'g 68 Ill. App. 497; *Norris v. Hartford Ins. Co.*, 57 S. C. 358, 35 S. E. Rep. 572.

RULE 92.

Agent Cannot Act in a Dual or Double Capacity.

A general power or authority given to an agent to do an act for his principal does not extend to a case where it appears that the agent himself is the person on the other side. An agent cannot act in a dual or double capacity. An agent of an insurance company has no power to insure himself or others for whom he is acting as agent unless he has express authority to

do so, or his acts are accepted or ratified with knowledge of the facts;¹ a policy so made or issued is not absolutely void but is merely voidable.²

1. *Timberlake v. Beardsley*, 22 App. Div. 439, 47 N. Y. Supp. 1123; *Bentley v. Columbia Ins. Co.*, 19 Barb. 595, aff'd, 17 N. Y. 421; *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132; *Empire State Ins. Co. v. American Central Ins. Co.*, 64 Hun, 485, aff'd, 138 N. Y. 446; *Phoenix Ins. Co. v. Hamilton*, 110 Ga. 14, 35 S. E. Rep. 305; *Ramspeck v. Pattillo*, 104 Ga. 772, 30 S. E. Rep. 962, 42 L. R. A. 197; *Firemen's Fund Ins. Co. v. McGreevy*, 118 Fed. Rep. 415, 55 C. C. A. 543; *Spare v. Home Ins. Co.*, 19 Fed. Rep. 14; *Valley Glass Co. v. American Central Ins. Co.*, 197 Pa. St. 254, 47 Atl. Rep. 232; *Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N. J. L. 674, 54 Atl. Rep. 458; *Zimmerman v. Dwelling-House Ins. Co.*, 110 Mich. 399, 68 N. W. Rep. 215, 26 Ins. L. J. 77; *Wildberger v. Hartford Ins. Co.*, 72 Miss. 338, 17 So. Rep. 282, 28 L. R. A. 220; *British American Assur. Co. v. Cooper*, 6 Colo. App. 25, 40 Pac. Rep. 147, 25 Ins. L. J. 437; *Manchester Assur. Co. v. Insurance Co.*, 91 Ill. App. 609; *Hartford Ins. Co. v. McKenzie*, 70 Ill. App. 615; *People's Ins. Co. v. Paddon*, 8 Bradw. 447 (Ill.); *Glens Falls Ins. Co. v. Hopkins*, 16 Bradw. 220, 14 Ins. L. J. 317 (Ill.); *Rickey v. German Mut. Ins. Co.*, 79 Mo. App. 485; *Fiske v. Royal Exchange Assur. Co.*, 100 Mo. App. 545, 75 S. W. Rep. 382; *London & Lancashire Ins. Co. v. Turnbull*, 86 Ky. 230, 5 S. W. Rep. 542; *Northrup v. Germania Ins. Co.*, 48 Wis. 420; *Georgia Home Ins. Co. v. City of Smithville*, 49 S. W. Rep. 412 (Tex. Civ. App.); *Hanover Ins. Co. v. Shrader*, 31 S. W. Rep. 1100 (Tex. Civ. App.); *White v. Lancashire Ins. Co.*, 27 Grant Ch. 61 (Can.).

2. *Pratt v. Dwelling-House Ins. Co.*, 130 N. Y. 206, 29 N. E. Rep. 117, 21 Ins. L. J. 146.

RULE 93.

When Agent Acts in Double Capacity.

An insurance agent does not act in a dual or double capacity when he is authorized by the insured to obtain or place excess insurance in other offices or companies;¹ but he does act in double capacity, if he is the

general agent of the insured in respect to the insured property, with general charge and supervision thereof, and charged with the duty to have and keep same insured, and to deal fully with respect to the insurance thereon and attempts to issue policies thereon as agent of companies represented by himself.²

1. *Marsh Oil Co. v. Ætna Ins. Co.*, 79 Mo. App. 21.

2. *British Amer. Ins. Co. v. Cooper*, 6 Colo. App. 25, 40 Pac. Rep. 147, 25 Ins. L. J. 437. And see Rule 92.

RULE 94.

Agent Stockholder, Director, and Officer of Another Corporation.

An insurance agent cannot bind his company without authority or ratification by it, by issuing a policy upon property of a corporation in which he is a stockholder, director, and an officer;¹ but the fact that company's agent was also the agent and small stockholder and one of the managing officers of the assured, his appointment by the insurance company having been made with full knowledge of the facts, and there being no fraud or concealment, is not sufficient to relieve the insurance company from being bound by the acts and knowledge of such agent.²

1. *Greenwood Ice Co. v. Georgia Home Ins. Co.*, 72 Miss. 46, 17 So. Rep. 83. And see *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85.

2. *Bank of Glasco v. Springfield F. & M. Ins. Co.*, 5 Kans. App. 388, 49 Pac. Rep. 329.

RULE 95.

Agent also Cashier of a Bank.

When the agent of the insurance company who issues the policy is also the cashier of a bank which

owns the property insured, his dual capacity prevents his sustaining the relation of agent as to the insurance company, and it is not liable, even although notice is not communicated to the assured until after the fire.

Rockford Ins. Co. v. Winfield, 57 Kans. 576, 47 Pac. Rep. 511, 26 Ins. L. J. 785.

RULE 96.

Agent Director of School District.

The fact that the agent of the insurance company who makes the contract of insurance covering public school property is at the same time one of the directors of the school district does not disqualify him from binding the insurance company by such contract.

German Ins. Co. v. Independent School District, 80 Fed. Rep. 366, 49 U. S. App. 271, 25 C. C. A. 492.

RULE 97.

Agents and Brokers Subject to Right of a State Legislature to Regulate the Business of Foreign Insurance Companies.

A State legislature has the right to subject an agent or a broker to a license or penalty for obtaining insurance in companies not authorized to do business within the State, even though the property or subject-matter of the insurance is not situated within the State. The right of the legislature to regulate the transaction of business by foreign corporations or to forbid it altogether is beyond question;¹ and such power may be delegated to a city.²

1. *Commonwealth v. Roswell*, 173 Mass. 119, 53 N. E. Rep. 132, citing *Hooper v. California*, 155 U. S. 648, 652; *Paul v. Virginia*, 8 Wall. 168 (U. S.), and distinguishing *Allgeyer v. Louisiana*, 165 U. S. 578. And see *Orient Ins. Co. v. Daggs*,

172 U. S. 557, aff'g 136 Mo. 382, 38 S. W. Rep. 85, 25 Ins. L. J. 67, 35 L. R. A. 227; *Liverpool, L. & G. Ins. Co. v. Massachusetts*, 10 Wall. 566 (U. S.); *Commonwealth v. Nutting*, 175 Mass. 154, 55 N. E. Rep. 895; *Pierce v. People*, 106 Ill. 11; *Stanhilber v. Mutual Ins. Co.*, 76 Wis. 285, 45 N. W. Rep. 221; *Fire Department v. Halfenstein*, 16 Wis. 136; *State v. Farmer*, 49 Wis. 459; *Farmers' Ins. Co. v. Harrah*, 47 Ind. 236; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204; *Commonwealth v. Gaither*, 107 Ky. 572, 54 S. W. Rep. 956; *Hickman v. State*, 62 N. J. L. 499, 41 Atl. Rep. 942, aff'd on opinion below, 44 Atl. Rep. 1099; *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471; *Depuy v. Delaware Ins. Co.*, 63 Fed. Rep. 680, 24 Ins. L. J. 161; *People v. Gray*, 107 Mich. 422, 65 N. W. Rep. 292, 25 Ins. L. J. 141, 30 L. R. A. 464; *Hartford Ins. Co. v. Raymond*, 70 Mich. 485; *Indiana Millers' Ins. Co. v. People*, 65 Ill. App. 355; *Insurance Co. N. A. v. Commonwealth*, 87 Pa. St. 173; *State v. Stone*, 118 Mo. 388, 24 S. W. Rep. 164, 23 Ins. L. J. 193.

When a broker is deemed an agent or broker within the meaning of the Massachusetts statute prohibiting him from acting as such unless licensed, etc., and preventing his recovery for commission, see *Pratt v. Burdon*, 168 Mass. 596, 47 N. E. Rep. 419.

2. *Hartford Ins. Co. v. Peoria*, 156 Ill. 420, 40 N. E. Rep. 967.

RULE 98.

Business of Insurance is not Commerce — Power of State.

The business of insurance is not commerce. A State has the power to exclude foreign insurance companies altogether from its territory; and it has the further right to prohibit its citizens from contracting within its jurisdiction with any foreign company which has not complied with the conditions imposed, either in their own behalf or through an agent. If such insurance is obtained for the resident by a broker who is himself a resident, this is "procuring" insurance within the State. The Fourteenth Amendment to the United States Constitution does not guarantee the citizen the right to make within his State, either di-

rectly or indirectly, a contract the making whereof is constitutionally forbidden by the State.

Hooper v. California, 155 U. S. 648, 24 Ins. L. J. 578. And see cases cited under Rule 97.

RULE 99.

Power of State over its Citizens.

When the insurance contract is made outside and beyond the limits of the jurisdiction of the State, being made and to be performed within another State, the State cannot constitutionally prohibit a citizen from making such a contract.

Allgeyer v. Louisiana, 165 U. S. 578, rev'g 48 La. Ann. 104, 18 So. Rep. 904, and distinguishing but approving *Hooper v. California*, 155 U. S. 648. And see *Pierce v. People*, 106 Ill. 11, 19; *Commonwealth v. Nutting*, 175 Mass. 154, 55 N. E. Rep. 895; *French v. People*, 6 Colo. App. 311, 40 Pac. Rep. 463, 24 Ins. L. J. 678; *Lamb v. Bowser*, 7 Biss. 315 (U. S. Cir.); *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep. 643.

An insurance company of one State may make a valid contract of insurance with one of its citizens upon property situated in another State where it has no authority to do business.

Scamans v. Knapp, S. & Co., 89 Wis. 171, 61 N. W. Rep. 757.

A State statute declaring all contracts void made by a foreign corporation with citizens of such State, unless it has first complied with its laws, does not affect contracts affecting property within the State, between foreign corporations and persons who are not citizens of the State.

St. Louis, Ark. & Tex. R. Co. v. Fire Assoc., 60 Ark. 325, 30 S. W. Rep. 350, 28 L. R. A. 83.

A statute requiring conditions in a policy to be printed in type as large or larger than that known as long primer, or to be written with pen and ink in or on the policy, and providing that if not complied with, failure to perform such conditions shall not be a valid defense in an action on the policy, is not unconstitutional.

Dupuy v. Delaware Ins. Co., 63 Fed. Rep. 680, 24 Ins. L. J. 161.

A State statute requiring an insurance company to make certain prescribed returns and reports is a valid exercise of the police power of the State, and hence is not unconstitutional.

Eagle Ins. Co. v. Ohio, 153 U. S. 446, 14 Sup. Ct. Rep. 868.

The collection of a tax upon gross receipts of a fire insurance company for maintenance and use of a local fire department cannot be enjoined.

Kunz v. National Fire Ins. Co., 169 Ill. 577, 48 N. E. Rep. 682.

Nor can the superintendent of an insurance department be enjoined from making effective the provisions of a statute prescribing the adoption of a standard form.

Businessmen's League v. Waddill, 143 Mo. 495, 45 S. W. Rep. 262, 40 L. R. A. 501.

A company having elected to do business in another State, under the terms of a statute governing its admission, must be held to have assented to be governed by the laws of that State, and to have its contracts construed as would be a like contract by a home company.

Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. Rep. 93.

RULE 100.

Liability of Agent or Broker to Penalty.

If the property is situated within the State, the liability of an agent or a broker to the penalty imposed cannot be escaped by obtaining the policy in another State upon an application by mail.

Indiana Mutual Ins. Co. v. People, 65 Ill. App. 355.

RULE 101.

Construction of Statute Defining Status of Agents.

A State statute limiting and defining the status of agents and including as such all who in any manner aid in transacting the insurance business of any insurance company, not incorporated by the laws of the State, makes an insurance company responsible not

only for the acts of its acknowledged agents, but also for the acts of all persons who aid in the transaction of its business. The mere assumption of authority is not sufficient of itself to charge the company with responsibility for the acts of the assumed agent. The company must in some way avail itself of such acts so that the person performing them may be said to aid the company in its insurance business;¹ the statute does not operate to increase an agent's authority or make a principal liable upon his own representations or admissions as to authority.²

1. *Pollock v. German Ins. Co.*, 127 Mich. 460, 86 N. W. Rep. 1017.

2. *Barry & Finan Lumber Co. v. Citizens' Ins. Co.*, Mich. , 98 N. W. Rep. 761.

RULE 102.

Statute Does not Change Rule of Law as to Principal and Agent.

A statute regulating foreign insurance companies and defining the word "agents" and specifying those included in the terms, relates to the matter of agency as between foreign companies and the State authorities, and does not change the rules of law as to principal and agent as between the company and a policyholder.

United Firemen's Ins. Co. v. Thomas, 92 Fed. Rep. 127, 34 C. C. A. 240, 28 Ins. L. J. 500, aff'g, on rehearing, 82 Fed. Rep. 406, 27 C. C. A. 42.

RULE 103.

Effect of Statute Prescribing Status of a Soliciting Agent.

A statute prescribing the status of a soliciting agent as the agent of the company does not prevent an agent who procures a policy for the assured from

acting as a broker or as the assured's agent. It is only when the two relations conflict that the statute prevails. Hence an agreement by such a broker when procuring insurance from other agents of insurance companies that his principal or assured will not take or accept additional insurance in same companies from other agents is binding upon the assured, even though he has no knowledge of such agreement until after a loss; if he then insists upon taking benefit of policies obtained in violation of such agreement it operates as a ratification of the agreement, whether originally authorized or not. Such an agreement is not waived by the company's ineffectual attempt to cancel the policies obtained by the broker.

John R. Davis Lumber Co. v. Hartford Ins. Co., 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131. And see *Wisconsin Central Ry. Co. v. Phoenix Ins. Co.*, Wis. , 101 N. W. Rep. 703.

RULE 104.

Statute Fixing Status of Soliciting Agent Not Extended by Construction.

A statute which undertakes to be specific in fixing the status of a soliciting agent and specific as to his authority will not be extended by construction so as to confer power on him to waive in behalf of the insurance company a breach of warranty by his mere knowledge when the policy issues.

Hartford Ins. Co. v. Walker, 94 Tex. 473, 61 S. W. Rep. 711, rev'g 60 S. W. Rep. 820. And see *Bourgeois v. Mutual Ins. Co.*, 86 Wis. 402, 57 N. W. Rep. 38, 23 Ins. L. J. 299.

When the authority to solicit the insurance and to make out and forward written applications is derived from the *com-*

pany itself, the rules of agency and its scope would seem to apply, independent of any statute. See Rules 7, *et seq.*, 33; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514, 46 S. W. Rep. 95.

RULE 105.

Status of Soliciting Agent Under Statute—Question of Fact.

The status of a soliciting agent as an agent of the insurance company as determined by a statute may be a question of fact proper to be submitted to a jury;¹ the statute creates a presumption subject to rebuttal.²

1. *Norris v. Hartford Ins. Co.*, 57 S. C. 358, 35 S. E. Rep. 572.

2. *Madden & Co. v. Phenix Assur. Co.*, S. C. , 49 S. E. Rep. 855.

The statutes of the different States defining and governing the legal status of agents will be found in this volume in the chapter containing statutory provisions. See preliminary note to that chapter.

In addition the cases cited might be examined, as to status of agents under the Iowa statute:

Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co., Iowa, , 101 N. W. Rep. 749; *Hartman v. Hollowell*, Iowa, , 102 N. W. Rep. 524; *St. Paul F. & M. Ins. Co. v. Shaver*, 76 Iowa, 282.

Under the Maine statute, *Day v. Dwelling-House Ins. Co.*, 81 Me. 244.

A broker who procured the policy is not the agent of the insurance company under the Maine statute to receive notice of a sale or transfer and consent to same.

Richmond v. Phoenix Assur. Co., 88 Me. 105, 33 Atl. Rep. 786, 25 Ins. L. J. 354.

A clause in an insurance policy making the broker or other person than the assured who procured it, the agent of the assured and not of the company, is valid under Massachusetts law.

Davis v. Aetna Mut. Ins. Co., 67 N. H. 335, 39 Atl. Rep. 902, 27 Ins. L. J. 549.

When a citizen of North Carolina applies for a policy in a foreign corporation, through a broker in that State, and the application is accepted and the policy is delivered, such broker, in an action in North Carolina under the statute, will be deemed the agent of the company.

Commonwealth Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. Rep. 404.

And so a broker may "aid" in the transaction of the business of an insurance company, as to come within the operative force of the Wisconsin statute fixing his status as agent.

Welch v. Fire Assoc., 120 Wis. 456, 98 N. W. Rep. 227; *Schomer v. Hekla Ins. Co.*, 50 Wis. 575, 10 Ins. L. J. 306; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136, 11 Ins. L. J. 126; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. Rep. 767. And see *Wisconsin Central Ry. Co. v. Phoenix Ins. Co.*, Wis. , 101 N. W. Rep. 703; *Stanhilber v. Mutual Ins. Co.*, Wis. , 45 N. W. Rep. 221; *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322, 58 N. W. Rep. 379, 23 Ins. L. J. 547; *Bourgeois v. Mutual Ins. Co.*, 86 Wis. 402, 57 N. W. Rep. 38, 23 Ins. L. J. 299; *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 95 Iowa, 31, 63 N. W. Rep. 565, 25 Ins. L. J. 17.

RULE 106.

Company Cannot Plead its Own Violation of Law.

A foreign company which issues a policy in a State through its agent who has not complied with statutory provisions cannot successfully plead its own violation of the law as an excuse for refusing to fulfill its contract.

Marshall v. Reading Ins. Co., 78 Hun, 83, 29 N. Y. Supp. 334, aff'd, 149 N. Y. 617, without opinion; *Swan v. Watertown Ins. Co.*, 96 Pa. St. 37; *Hoge v. Dwelling-House Ins. Co.*, 138 Pa. St. 66, 20 Atl. Rep. 939; *Clay Ins. Co. v. Huron Mfg. Co.*, 31 Mich. 346; *Ganser v. Firemen's Fund Ins. Co.*, 34 Minn. 372, 15 Ins. L. J. 555; *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 45 N. W. Rep. 408, 8 L. R. A. 236. And see *Watertown Ins. Co. v. Rust*, 141 Ill. 85, 30 N. E. Rep. 772, aff'g 40 Ill. App. 119; *Columbia Ins. Co. v. Kinyon*, 8 Vroom, 33 (N. J.). But see and compare *Franklin Ins. Co. v. Louisville Packet Co.*, 9 Bush, 590 (Ky.); *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; *Lycoming Ins. Co. v. Wright*, 55 Vt. 526.

While a State legislature has a perfect right to regulate insurance companies and business within the State, it cannot

legally or constitutionally prevent a citizen of the State from obtaining through a broker or agent a valid contract of insurance on his property in the State by an insurance company in another State where the contract is made and to be performed, even though such company is not authorized to do business within the State; and the insurance company may maintain an action in the State to recover the premium.

Western Mass. Ins. Co. v. Hilton, 42 App. Div. 52, 58 N. Y. Supp. 996, citing *Allgeyer v. Louisiana*, 165 U. S. 578. And see *Columbus Ins. Co. v. Walsh*, 18 Mo. 229.

Such a contract of insurance, while it may be valid and enforceable in the State where made, may not be enforced in the State where the insured resides and the property is located.

Swing v. Munson, 191 Pa. St. 582, 43 Atl. Rep. 342.

A note made for uncollected premiums by insurance agents of a foreign insurance company which has not complied with a State statute is void.

New Hampshire Ins. Co. v. Kennedy, 96 Tenn. 711, 36 S. W. Rep. 709.

A policy or contract of a foreign insurance company, which has not complied with the laws prescribed by the State, is void; and a note given for the premium in consideration of same cannot be enforced in an action in such State, as it is without consideration.

Swing v. Clarksville Cider Co., 77 Mo. App. 391. And see *Re Mutual Guaranty Fire Ins. Co.*, 107 Iowa, 143, 77 N. W. Rep. 868, 28 Ins. L. J. 205.

An insurance company which has not complied with statutory requirements of the State of Minnesota and authorized to do business in that State cannot recover premiums on policies insuring property in that State, whether the policies were made within or without the State; it makes no difference whether the company is a foreign corporation or a foreign unincorporated association.

Seamans v. Christian Brothers' Mill Co., 66 Minn. 205, 68 N. W. Rep. 1065.

The policy of a foreign insurance company is not rendered void by reason of noncompliance with a statute prescribing the conditions upon which it may legally transact business within the State.

State Mut. Ins. Co. v. Brinkley Stave Co., 31 S. W. Rep. 157, 29 L. R. A. 712 (Ark.).

The failure of an insurance company to comply with a statute requiring every foreign insurance company to have one head office in the State under the charge of a general agent does not

prevent it from enforcing a mortgage taken as security for a payment of a balance due from a former agent.

Continental Ins. Co. v. Rikken, 31 Oreg. 336, 48 Pac. Rep. 476, 26 Ins. L. L. 590.

In an action brought by a receiver of a Massachusetts insurance company not authorized to do business in Maryland, under the statute of that State, to recover assessments on a policy which had been issued to the defendant, it appeared that the assured had made application to an insurance broker in Baltimore, who wrote to another insurance broker in New York, who in turn made application to the insurance company which issued the policy. The policy was signed in Boston, mailed by the company to the New York broker, and by him sent to the broker in Baltimore, who delivered the same to the defendant and collected the premium, and after deducting his commission remitted the balance to the New York broker, by whom it was paid to the insurance company in Massachusetts. Held, that the contract of insurance was made in Maryland and not in Massachusetts, for the reason that it was not completed until the policy was delivered and premium collected by the broker in Baltimore who acted as the agent of the insurance company for such purposes, and that as the contract was made contrary to the statute that the plaintiff could not recover.

Stevens v. Rasin Fertilizer Co., 87 Md. 679, 41 Atl. Rep. 116.

TITLE III.

Renewal.

- RULE**
1. As imposed by contract.
 2. Construction of contract of renewal.
 3. Increase of risk not made known.
 4. When notice required of increase of risk — Form.
 5. Application of renewal to descriptive clauses.
 6. Payment of premium.
 7. Authority of company's agent to renew.
 8. Limitation of authority from insured to renew.
 9. New policy issued instead of renewal — Reformation.
 10. Renewal as affecting partnership interests.
 11. Oral or parol contract of renewal — Evidence — Authority of agent — Presumption as to terms.
 12. Not established by mere negotiation — Minds must meet.
 13. Burden of proof — Question of fact.
 14. Property destroyed at time of renewal.

- RULE 15. Waiver or estoppel in renewal.
 16. Waiver or estoppel continues through renewals — Notice of increase of risk.
 17. Terms of contract not changed by evidence.
 18. Estoppel by representation of renewal.

RULE 1.

As Imposed by Contract.

This policy may, by a renewal, be continued under the original stipulations, in consideration of the premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This rule is imposed by above terms in the standard form of policy prescribed in :

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form of policy prescribed in :

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

does not contain any such provision.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

Some of the old forms required notice of "any change in the risk" upon renewal, and it was held that there was no change of risk, unless the risk was increased by the change.

Parker v. Arctic Ins. Co., 59 N. Y. 1; *Brueck v. Phoenix Ins. Co.*, 21 Hun, 542 (N. Y.).

And that the clause had no application to a change in the parties.

Lancey v. Phoenix Ins. Co., 56 Me. 562. And see *Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. Rep. 139.

* See note to "Concealment," Rule 1, page 2.

RULE 2.

Construction of Contract of Renewal.

A renewal is not the effecting of new or other insurance, but is merely a specific contract for the continuance of existing insurance upon same terms and conditions;¹ yet it is a new contract, and is subject to local laws in force at the time of the renewal;² and may be issued to and enforced by an assignee of the policy,³ or an executor of a deceased insured,⁴ and will cover their respective interests. There is no legal objection to a renewal being issued to one of several parties originally insured.⁵ If a new policy is issued it is not considered as a renewal.⁶

1. *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Hay v. Star Ins. Co.*, 77 N. Y. 235; *Aurora Ins. Co. v. Kranich*, 36 Mich. 289; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368, 12 Ins. L. J. 817; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *Hartford Ins. Co. v. Walsh*, 54 Ill. 164; *Shearman v. Niagara Ins. Co.*, 46 N. Y. 526. And see *Howard v. Lancashire Ins. Co.*, 11 Duval, 92 (Can. Sup.); *Baltimore Ins. Co. v. McGown*, 16 Md. 47; *Planters' Ins. Co. v. Ray*, 52 Miss. 325.

2. *Brady v. Northwestern Ins. Co.*, 11 Mich. 425.

3. *Peoria Ins. Co. v. Hervey*, 34 Ill. 46. And see *New England Ins. Co. v. Wetmore*, 32 Ill. 221; *Wyman v. Imperial Ins. Co.*, 16 Duval, 715 (Can. Sup.).

4. *Phelps v. Gebhard Ins. Co.*, 9 Bosw. 404 (N. Y.).

5. *Lockwood v. Middlesex Ins. Co.*, 47 Conn. 553.

6. *Marthinson v. North British & M. Ins. Co.*, 64 Mich. 372; *Healey v. Imperial Ins. Co.*, 5 Nev. 268.

RULE 3.

Increase of Risk not Made Known.

An increase of risk not made known to the insurance company at the time of renewal renders it void.

Daniels v. Equitable Ins. Co., 48 Conn. 105, 10 Ins. L. J. 417; *Peoria Sugar Refinery Co. v. People's Ins. Co.*, 15 Ins. L. J. 52 (U. S. Cir.). And see 52 Conn. 581; *Cole v. Germania Ins. Co.*, 99 N. Y. 36.

RULE 4.**When Notice Required of Increase of Risk — Form.**

When notice is required on renewal of an increase of risk, and there is no express stipulation requiring it to be given in writing, it is sufficient to orally communicate the fact to the insurance company.

Liddle v. Market Ins. Co., 29 N. Y. 184.

RULE 5.**Application of Renewal to Descriptive Clauses.**

Descriptive clauses in the original policy apply to the insured premises at the time of the assumption by the insurance company of the last contract of renewal;¹ and if the representations in the original application are then true, and there is no cause of forfeiture then existing, a renewal operates to continue the insurance notwithstanding prior causes of forfeiture.² A policy is to be treated as written on day of its renewal.³

1. *Garrison v. Farmers' Ins. Co.*, 56 N. J. L. 235, 28 Atl. Rep. 8.

2. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

3. *Noyes v. Hartford Ins. Co.*, 54 N. Y. 668, 3 Ins. L. J. 44. And see *Chapman v. Gore District Ins. Co.*, 26 Up. Can. C. P. 89.

RULE 6.**Payment of Premium.**

The consideration, or premium, for renewal of a policy may be paid by a party to whom the loss is made payable.

Mechler v. Phoenix Ins. Co., 38 Wis. 665.

RULE 7.

Authority of Company's Agent to Renew.

The authority of an agent to renew a policy cannot be questioned when the company has furnished such agent with blank policies and renewal receipts, signed by its officers, to be filled up by such agent when issued, and the renewal receipt in question, when so furnished the agent, contained a clause that it was not valid unless countersigned by him;¹ and so when the acts of an agent in making renewals have been several times ratified by the company, it becomes evidence of authority;² and when the agent has authority to renew, limitations on such authority as to manner of renewal, not known to the insured, do not prevent the agent from renewing the insurance contrary to such limitations.³

1. *Carroll v. Charter Oak Ins. Co.*, 40 Barb. 292, aff'd, 1 Abb. Ct. App. Dec. 316.

2. *Franklin Ins. Co. v. Massey*, 33 Pa. St. 221.

3. *Western Home Ins. Co. v. Hogue*, 41 Kans. 524, 21 Pac. Rep. 641.

And see this volume, title, "Agents."

RULE 8.

Limitation of Authority from Insured to Renew.

Consent or authority from the insured to a local agent to renew a certain policy does not make such local agent his agent to apply for other insurance to agents for another company in another State.

South Bend Toy Mfg. Co. v. Dakota Ins. Co., 2 S. D. 17, 48 N. W. Rep. 310, 20 Ins. L. J. 871, aff'd on rehearing, 52 N. W. Rep. 866.

RULE 9.**New Policy Issued Instead of Renewal — Reformation.**

When the insurance company agrees to renew an insurance upon the same terms as the policy previously issued, and instead of a renewal receipt issues a new policy containing clauses or conditions (such as a co-insurance clause) not in the old policy, the insured is entitled to have the new policy reformed on the ground of mistake by striking out such clause or clauses; in the promise of renewal there is sufficient legal justification for the insured's omission to examine the new policy.

Palmer v. Hartford Ins. Co., 54 Conn. 488, 9 Atl. Rep. 248, 16 Ins. L. J. 241; *Burson v. Philadelphia Fire Assoc.*, 136 Pa. St. 267, 20 Atl. Rep. 401, 20 Ins. L. J. 144.

And see this volume, "Reformation."

RULE 10.**Renewal as Affecting Partnership Interests.**

A renewal receipt issued to and in the name of a partnership by its firm name covers the interest of such firm as constituted at time of the renewal, and notice to the insurance company of a change in such firm is not essential.

Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. Rep. 139, 16 Ins. L. J. 831.

RULE 11.**Oral or Parol Contract of Renewal — Evidence — Authority of Agent — Presumption as to Terms.**

An oral contract of renewal of insurance is binding, without payment of the premium, where credit is given, or it appears from the circumstances and situa-

tion of the parties that the payment of the premium was not exacted at the time;¹ such a contract must be established by a clear preponderance of evidence,² and cannot be made by an agent without actual or ostensible authority to make it;³ if nothing said about premium, the presumption is that previous rate is to be paid;⁴ if nothing said about time, the law presumes that the renewal is for one year;⁵ but when expressed it cannot be enlarged or extended by construction.⁶ An agreement to renew implies that the terms of an existing policy are to be continued.⁷

1. *King v. Cox*, 63 Ark. 204, 37 S. W. Rep. 877; *Squier v. Hanover Ins. Co.*, 162 N. Y. 552, 57 N. E. Rep. 93, aff'g 18 App. Div. 575, 46 N. Y. Supp. 30; *Abel v. Phoenix Ins. Co.*, 47 App. Div. 81, 62 N. Y. Supp. 218; *Springer v. Anglo-Nevada Ins. Co.*, 58 Hun, 601, 11 N. Y. Supp. 533; *Baldwin v. Phoenix Ins. Co.*, 107 Ky. 356, 54 S. W. Rep. 13; *Mallette v. British America Ins. Co.*, 91 Md. 471, 46 Atl. Rep. 1005; *King v. Hekla Ins. Co.*, 58 Wis. 508. And see *Mechanics & Traders' Ins. Co. v. Mutual Real Estate Assoc.*, 98 Ga. 262, 25 S. E. Rep. 457; *Post v. Aetna Ins. Co.*, 43 Barb. 351 (N. Y.); *Zigler v. Phoenix Ins. Co.*, 82 Iowa, 569, 48 N. W. Rep. 987.

2. *Abel v. Phoenix Ins. Co.*, *supra*; *King v. Hekla Ins. Co.*, *supra*; *Johnson v. Connecticut Ins. Co.*, 84 Ky. 470.

3. *Stewart v. Helvetia-Swiss Ins. Co.*, 102 Cal. 218, 36 Pac. Rep. 410, 24 Ins. L. J. 475.

4. *Post v. Aetna Ins. Co.*, 43 Barb. 351 (N. Y.).

5. *Scott v. Home Ins. Co.*, 53 Wis. 238, 11 Ins. L. J. 177.

6. *Fuchs v. Germantown Ins. Co.*, 60 Wis. 286, 13 Ins. L. J. 469.

7. *Hay v. Star Ins. Co.*, 77 N. Y. 235. But see, under the Georgia statute which requires insurance contracts to be evidenced by writing, *Roberts v. Germania Ins. Co.*, 71 Ga. 478; *Crogham v. Underwriters' Agency*, 53 Ga. 109.

RULE 12.

Not Established by Mere Negotiation — Minds Must Meet.

A parol contract of renewal cannot be established by mere negotiation; the minds of the parties must meet upon terms well understood,¹ without anything being left for future determination.² Silence of the company or its agent when renewal is requested cannot be construed as an assent.³

1. *King v. Hekla Ins. Co.*, 58 Wis. 508, 13 Ins. L. J. 146; *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6, 12 Atl. Rep. 607. And see *Zigler v. Phoenix Ins. Co.*, 82 Iowa, 569, 48 N. W. Rep. 987; *Continental Ins. Co. v. Jenkins*, 5 Ins. L. J. 514 (Ky.).

2. *Johnson v. Connecticut Ins. Co.*, 84 Ky. 470, 16 Ins. L. J. 369; *O'Reilly v. London Assur. Co.*, 101 N. Y. 575, 15 Ins. L. J. 830.

3. *Royal Ins. Co. v. Beatty*, *supra*.

RULE 13.

Burden of Proof — Question of Fact.

The burden of proof to establish a renewal rests upon the insured, and when there is a conflict in the evidence as to a parol contract of renewal the question is properly submitted to and determined by a jury.

Giddings v. Phoenix Ins. Co., 90 Mo. 272, 16 Ins. L. J. 510; *King v. Hekla Ins. Co.*, 58 Wis. 508.

RULE 14.

Property Destroyed at Time of Renewal.

If the property is destroyed after expiration of the original policy, and the fact is not communicated to the insurance company at the time of a subsequent

agreement to renew, such agreement will not be enforced.

Dodd v. Home Ins. Co., 22 Oreg. 13, 28 Pac. Rep. 3, 21 Ins. L. J. 359; rehearing denied, 28 Pac. Rep. 881, 21 Ins. L. J. 352.

RULE 15.

Waiver or Estoppel in Renewal.

Renewal of a policy by the company or its agent with knowledge of existing facts, which by its terms or conditions would render it void, operates as a waiver or estoppel preventing the company from claiming a forfeiture by reason of such facts.

Carey v. Home Ins. Co., 97 Iowa, 619, 66 N. W. Rep. 920; *Virginia F. & M. Ins. Co. v. Richmond Mica Co.*, 102 Va. 429, 46 S. E. Rep. 463; *King v. Cox*, 63 Ark. 204, 37 S. W. Rep. 877; *Mechler v. Phoenix Ins. Co.*, 38 Wis. 665; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *Whited v. Germania Ins. Co.*, 76 N. Y. 415; *Liddle v. Market Ins. Co.*, 4 Bosw. 179, aff'd, 29 N. Y. 184; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. 402, 40 Barb. 292, 1 Abb. Ct. App. Dec. 316; *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379; *Robinson v. Pacific Ins. Co.*, 18 Hun, 395; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *State Ins. Co. v. Todd*, 83 Pa. St. 272; *Law v. Hand-in-Hand Ins. Co.*, 29 Up. Can. C. P. 1; *Story v. Hope Ins. Co.*, 37 La. Ann. 254.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rules 16 and 17.

RULE 16.

Waiver or Estoppel Continues Through Renewals — Notice of Increase of Risk.

A waiver, estoppel, or permission, operative at the time the policy is originally issued, continues through subsequent renewals; and so notice of an increase of risk before renewal of an original policy runs through

all subsequent insurances, even though a new policy is afterward substituted.²

1. *Kruger v. Western Ins. Co.*, 72 Cal. 91, 13 Pac. Rep. 156; *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun, 328. And see *Carrugi v. Atlantic Ins. Co.*, 40 Ga. 135.

2. *People's Ins. Co. v. Spencer*, 53 Pa. St. 353.

RULE 17.

Terms of Contract not Changed by Evidence.

The terms of the insurance contract or policy cannot be changed on contradictory evidence as to a parol understanding or agreement.

Shopp v. Patrons Ins. Co., 197 Pa. St. 219, 47 Atl. Rep. 201.

RULE 18.

Estoppel by Representation of Renewal.

When the agents of an insurance company, who are duly authorized to solicit and make contracts of insurance, deliberately represent to the assured that a given policy issued by the company has been renewed, and subsequently receive and appropriate money which they have good reason to believe is paid to cover the cost of such extended insurance, the company will be estopped to allege, after a loss has occurred, that the policy in question was not renewed.

International Trust Co. v. Norwich Union Ins. Soc., 71 Fed. Rep. 81, 36 U. S. App. 277, 17 C. C. A. 608.

TITLE IV.

Premium.

- RULE**
1. As imposed by contract.
 2. Waiver of prepayment of the premium — Evidence — Question of fact.
 3. Authority of agent to waive prepayment of premium — Authority to waive or collect may be conferred on soliciting agent or broker — Evidence.
 4. Authority of agent as to mode or kind of payment.
 5. Effect of personal assumption of debt for premium by agent.
 6. Company may accept note of broker or credit him with payment — Authority — Evidence.
 7. Effect of acknowledgment in policy when delivered through broker.
 8. Broker agent of insured — Must be evidence of authority in him from company.
 9. Liability of broker for unearned premium.
 10. Advancement of premium by broker or agent — Right of recovery — Evidence — Effect.
 11. If policy in force by delivery and credit for premium, terminated only by cancellation.
 12. Legal tender of payment.
 13. Payment of premium may be made condition precedent.
 14. Policy may make payment of premium condition precedent.
 15. Effect of giving credit for premium.
 16. Effect of option to take policy on payment of premium.
 17. Provision in policy modified by usual course of business.
 18. Effect of acknowledgment in policy of receipt of premium.
 19. When insured agent to receive premium.
 20. Payment as affected by an account.
 21. When premium is returnable.
 22. When officer or agent personally liable for return of premium.
 23. Company bound by condition imposed on delivery of note for premium.
 24. When insured not liable for earned premium on surrender for cancellation.

- RULE 25. Effect of acceptance of premium after a loss.
 26. In suit upon policy company entitled to credit for unpaid premium.

RULE 1.

As Imposed by Contract.

In consideration of the stipulations herein named
 and of dollars premium, does insure

The above clause or provision is contained in the standard form of policy prescribed in:

New York,
 Connecticut,
 Louisiana,
 Michigan,
 Missouri,
 New Jersey,

North Carolina,
 North Dakota,
 *Pennsylvania,
 Rhode Island,
 Wisconsin.

The standard form of policy prescribed in:

Maine,
 Massachusetts,

South Dakota,

provides:

"In consideration of dollars to it paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure

The standard form of policy prescribed in Minnesota provides:

"In consideration of dollars to be paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure

The standard form of policy prescribed in New Hampshire provides:

"In consideration of dollars to them paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, do insure

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

* See note to "Concealment," Rule 1, page 2.

RULE 2.

Waiver of Prepayment of the Premium — Evidence — Question of Fact.

An insurance company waives prepayment of the premium in cash by the delivery of the policy without such payment;¹ whenever credit is given for the premium it operates as a waiver of prepayment;² waiver may be inferred from any conduct inconsistent with an intent to insist upon prepayment of the premium;³ and this rule applies even if the policy provides that it is not binding until the premium is paid;⁴ if there is any evidence from which it may be inferred that credit was given, the question of waiver must be submitted to a jury,⁵ and it may be inferred from previous action of the company in connection with another policy.⁶

1. *Commonwealth Ins. Co. v. Knabe Mfg. Co.*, 171 Mass. 265, 50 N. E. Rep. 516; *Kollitz v. Equitable Ins. Co.*, 92 Minn. 234, 99 N. W. Rep. 892; *Healy v. Insurance Co. N. A.*, 50 App. Div. 327, 63 N. Y. Supp. 1055; *Germania Ins. Co. v. Miller*, 110 Ill. App. 190; *Gosch v. State Mutual Ins. Co.*, 44 Ill. App. 263.

2. *Firemen's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. Rep. 779; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. Rep. 1060, 23 Ins. L. J. 349; *Church v. Lafayette Ins. Co.*, 66 N. Y. 222; *La Societe Bienfaisance v. Morris*, 24 La. Ann. 347; *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113. And see *Lebanon Ins. Co. v. Hoover*, 113 Pa. St. 591, 16 Ins. L. J. 679, 882; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151; *Ruggles v. American Central Ins. Co.*, 114 N. Y. 415.

3. *Gaysville Mfg. Co. v. Phoenix Ins. Co.*, 67 N. H. 457, 36 Atl. Rep. 367; *Estes v. Home Manufacturers' Ins. Co.*, 67 N. H. 462, 33 Atl. Rep. 515. And see *Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112, 51 N. W. Rep. 188; *Washoe Mfg. Co. v. Hibernia Ins. Co.*, 66 N. Y. 613; *Hallock v. Commercial Ins. Co.*, 2 Dutch. 268 (N. J.).

4. *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; *Boehen v. Williamsburg City Ins. Co.*, 35 N. Y. 131; *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Hodge v. Security Ins. Co.*, 33 Hun, 583; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460; *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Baptist Church v. Brooklyn Ins. Co.*, 28 N. Y. 153; *Pino v. Merchants' Ins. Co.*, 19 La. Ann. 214; *Heaton v. Manhattan Ins. Co.*, 7 R. I. 502; *North Alabama Home Protection Co. v. Avery*, 85 Ala. 348; *East Texas Ins. Co. v. Mims*, 1 Tex. Ct. App. Civ. Cas., § 1323; *Equitable Ins. Co. v. McCrea*, 8 Lea, 541 (Tenn.); *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. Rep. 869; *Nebraska Ins. Co. v. Christiensen*, 29 Nebr. 572, 45 N. W. Rep. 924; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *Daft v. Drew*, 40 Ill. App. 266; *Mason v. Citizens' Ins. Co.*, 10 W. Va. 572.

5. *Church v. Lafayette Ins. Co.*, 66 N. Y. 222; *La Societe Bienfaisance v. Morris*, 24 La. Ann. 347; *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113; *Baldwin v. Choteau Ins. Co.*, 56 Mo. 151. And see *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521.

6. *Bowman v. Agricultural Ins. Co.*, *supra*.

RULE 3.

Authority of Agent to Waive Prepayment of Premium — Authority to Waive or Collect May be Conferred on Soliciting Agent or a Broker — Evidence.

It is within the scope of the authority of a general agent authorized to make the insurance contract by countersigning and issue of the policy or his clerk to waive the immediate payment of the premium and to make contracts for credit;¹ and an insurance company may clothe a soliciting agent or even a broker with authority to collect the premium, or waive its prepayment;² but, in absence of other evidence, his status may be governed by an agency clause in the policy.³ The authority of a broker to collect the premium may be established by course of business, mutual accounts, and habit of the insurance company in giving him policies

to deliver to the insured;⁴ but is not established by a single transaction.⁵

1. *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. Rep. 869; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; *Ball & Sage Wagon Co. v. Aurora Ins. Co.*, 20 Fed. Rep. 232, 13 Ins. L. J. 367; *Monitor Ins. Co. v. Young*, 111 Mass. 537; *Slobodisky v. Phoenix Ins. Co.*, 53 Nebr. 816, 74 N. W. Rep. 270.

2. *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. Rep. 118; *Elkins v. Susquehanna Ins. Co.*, 113 Pa. St. 387; *Cahill v. Andes Ins. Co.*, 5 Biss. 211 (U. S. Cir.); *Lycoming Ins. Co. v. Ward*, 90 Ill. 545; *Newark Ins. Co. v. Sammons*, 110 Ill. 166. And see *Planters' Ins. Co. v. Meyers*, 55 Miss. 479; *Universal Ins. Co. v. Block*, 109 Pa. St. 535; *Riley v. Commonwealth Ins. Co.*, 110 Pa. St. 144; *Lebanon Ins. Co. v. Erb*, 112 Pa. St. 149.

See also this volume, title "Agents."

3. *Wilber v. Williamsburg City Ins. Co.*, 122 N. Y. 439, 25 N. E. Rep. 926.

4. *Globe & Rutgers Ins. Co. v. Robbins & Myers Co.*, 43 Misc. 65, 86 N. Y. Supp. 493; upon subsequent appeal reaff'd, 88 N. Y. Supp. 996.

5. *Citizens' Ins. Co. v. Swartz*, 21 Misc. 671.

RULE 4.

Authority of Agent as to Mode or Kind of Payment.

When the mode of payment of the premium is not prescribed by the company, its agent authorized to receive it may accept in payment a check payable to his own order;¹ but ordinarily, in absence of evidence of express authority, or of ratification, he is not authorized to receive or accept anything but money;² yet, when he actually pays the premium in cash to the company, it ends the matter so far as the company is concerned.³

1. *Tayloe v. Merchants' Ins. Co.*, 9 How. 390 (U. S.). And see *Universal Ins. Co. v. Block*, 109 Pa. St. 535.

2. *Folb v. Firemen's Ins. Co.*, 133 N. C. 179, 45 S. E. Rep. 547; *Herring v. American Ins. Co.*, 123 Iowa, 533, 99 N. W.

Rep. 130. And see *Hoffman v. John Hancock Ins. Co.*, 92 U. S. 161; *Equitable Ins. Co. v. Cole*, 13 Tex. Civ. App. 486; *Willcuts v. Northwestern Ins. Co.*, 81 Ind. 300; *Frazer v. Gore District Ins. Co.*, 2 Ont. 416.

In *Carlwitz v. Germania Ins. Co.*, 12 Ins. L. J. 127 (U. S. Cir.), the court seems to incline to the opinion that an agent might bind his company in making agreement with the assured to accept payment of the premium in trade.

3. *Herring v. American Ins. Co.*, 123 Iowa, 533, 99 N. W. Rep. 130.

RULE 5.

Effect of Personal Assumption of Debt for Premium by Agent.

If an agent in usual course of business charges himself with the premium, and upon delivery of the policy is obliged to pay it as his own debt, the insured becomes debtor to the agent, and the agent to the company, and this in view of such course of business may be the equivalent of actual payment;¹ so an agent having authority to receive the premium may, by agreement with the insured, assume a personal responsibility for the same, which, in legal effect, may constitute a payment as between the insured and the company.²

1. *Elkins v. Susquehanna Ins. Co.*, 113 Pa. St. 386, 16 Ins. L. J. 78. And see *Lebanon Mutual Ins. Co. v. Hoover*, 113 Pa. St. 591, 16 Ins. L. J. 679; *Long v. North British Ins. Co.*, 137 Pa. St. 335; *Home Ins. Co. v. Curtis*, 32 Mich. 402.

2. *Bouton v. American Ins. Co.*, 25 Conn. 542; *Sheldon v. Connecticut Ins. Co.*, 25 Conn. 207.

RULE 6.

Company May Accept Note of Broker or Credit Him with Payment — Authority — Evidence.

An insurance company may accept a negotiable promissory note of a broker in payment of a pre-

mium;¹ and so the company may accept the individual obligation or credit of a broker as a payment of the premium;² and by charging premiums to the broker and delivering policies to him to deliver to the assured, may clothe the broker with apparent authority to receive the premium,³ and if authorized to receive the premium for the company, he may take a note for same, and as soon as he receives the money on such note by having it discounted, the premium is actually paid,⁴ and this is so notwithstanding an agency clause in the policy making the broker the agent of the insured.⁵

1. *Union Ins. Co. v. Grant*, 68 Me. 229.

2. *White v. Connecticut Ins. Co.*, 120 Mass. 330; *Bang v. Farmville Ins. Co.*, 1 Hughes, 290 (U. S. Cir.). And see *Elkins v. Susquehanna Ins. Co.*, 113 Pa. St. 386.

3. *Greenwich Ins. Co. v. Union Dredging Co.*, 14 Daly, 237 (N. Y.); *Lebanon Ins. Co. v. Erb*, 112 Pa. St. 149.

4. *Carson v. Jersey City Ins. Co.*, 14 Vroom, 300 (N. J.).

5. *Carson v. Jersey City Ins. Co.*, *supra*. And see this volume, title "Agents."

In *White v. Connecticut Ins. Co.*, *supra*, it was the custom of the company to deliver policies to the broker without requiring cash payment of the premium, charging the same to his individual account, and rendering to him monthly bills, deducting an agreed commission for obtaining risks. In his monthly settlements the broker paid the premiums charged to him, whether he had collected them or not, and in this case he offered to pay the premium at his first settlement after the issue of the policy and after the fire.

And to same effect was *Elkins v. Susquehanna Ins. Co.*, *supra*.

RULE 7.

Effect of Acknowledgement in Policy when Delivered Through Broker.

If a policy is sent by the company to a broker to deliver to the insured, containing or having indorsed

an acknowledgment or receipt for the premium, it clothes him with authority to receive the premium, and payment of same to him is payment to the company;¹ so sending a policy to an insurance agent, not a broker, to deliver to the insured, clothes him with authority to receive the premium.²

1. *Lebanon Ins. Co. v. Erb*, 112 Pa. St. 149. And see *Universal Ins. Co. v. Block*, 109 Pa. St. 535.

See also this volume, title "Agents."

2. *Pulaski Mutual Ins. Co. v. Dawson*, 87 Ill. App. 514.

RULE 8.

Broker Agent of Insured — Must be Evidence of Authority in Him from Company.

A broker is ordinarily an agent of the insured and not of the company; hence, in absence of some evidence clothing him with authority by the company, payment of the premium to him is not a payment to the company;¹ nor is the insurance company bound by any credit or arrangement or waiver made by the broker with the insured.²

1. *Pottsville Ins. Co. v. Minnequa Springs Improvement Co.*, 100 Pa. St. 137, 11 Ins. L. J. 892; *Peoria Sugar Refinery v. Susquehanna Ins. Co.*, 20 Fed. Rep. 480, 14 Ins. L. J. 333.

2. *Marland v. Royal Ins. Co.*, 71 Pa. St. 393. And see *Riley v. Commercial Ins. Co.*, 110 Pa. St. 144; *Hambleton v. Home Ins. Co.*, 6 Biss. 91 (U. S. Cir.).

And see this volume, title "Agents."

RULE 9.

Liability of Broker for Unearned Premium.

A broker is not liable to the receiver of insured for unearned premium not actually paid over by the insurance company to him, upon theory of a conversion.

Taylor v. Bowen, 52 App. Div. 126, 65 N. Y. Supp. 36.

And see this volume, title "Agents."

RULE 10.

Advancement of Premium by Broker or Agent — Right of Recovery — Evidence — Effect.

An insurance agent or a broker who advances and pays the premium upon an insurance policy at the request of the assured may recover same from the latter;¹ request or authority to make such payment to the company must be shown.² When an agent advances premium to the company and takes a note of the insured for the same, the company cannot dispute liability on the ground that the premium is not paid.³

1. *Hughson v. Hardy*, 62 Minn. 209, 64 N. W. Rep. 389; *De Wolf v. Washington*, 119 Wis. 554, 97 N. W. Rep. 220.

And see this volume, title "Agents."

2. *Ross v. Silverman*, 24 Misc. 762, 53 N. Y. Supp. 901; *Ross v. Rubin*, 25 Misc. 479, 54 N. Y. Supp. 1036. And see *Degroot v. Clark*, 51 App. Div. 606, 64 N. Y. Supp. 282; *Waters v. Wandless*, 35 S. W. Rep. 184 (Tex. Civ. App.); *Holmes v. Thomason*, 61 S. W. Rep. 504 (Tex. Civ. App.); *Colby v. Thompson*, 16 Colo. App. 271, 64 Pac. Rep. 1053.

3. *Home Ins. Co. v. Curtis*, 32 Mich. 402.

And see Rule 4.

RULE 11.

If Policy in Force by Delivery and Credit for Premium, Terminated Only by Cancellation.

Where policy has been delivered to the insured without prepayment of the premium, and credit given therefor, it must be held to be in force subject to right of the company to cancel.

John R. Davis Lumber Co. v. Home Ins. Co., 95 Wis. 542, 70 N. W. Rep. 59.

See this volume "Cancellation."

RULE 12.

Legal Tender of Payment.

A legal tender of payment of the premium within the time of credit allowed is a sufficient compliance with any condition requiring payment.

Farnum v. Phoenix Ins. Co., 83 Cal. 246, 23 Pac. Rep. 869.

RULE 13.

Payment of Premium May be Made Condition Precedent.

An insurance company may make the prepayment of the premium a condition precedent to the existence of insurance, notwithstanding delivery of the policy to the insured or through a broker.

Pottsville Mutual Ins. Co. v. Minnequa Springs Improvement Co., 100 Pa. St. 137, 11 Ins. L. J. 892; *Peoria Sugar Refinery v. Susquehanna Ins. Co.*, 20 Fed. Rep. 480, 14 Ins. L. J. 333; *Flint v. Ohio Ins. Co.*, 8 Ohio, 501. And see *Union Building Assoc. v. Rockford Ins. Co.*, 83 Iowa, 647, 49 N. W. Rep. 1032, 14 L. R. A. 248; *Anderson v. Continental Ins. Co.*, 105 N. Y. 666, memo. reversing judgment in favor of plaintiff on dissenting opinion of Davis, P. J., in court below. See 21 Wkly. Dig. 35. *Marland v. Royal Ins. Co.*, 71 Pa. St. 393; *Mulvey v. Shawmut Ins. Co.*, 4 Allen, 116 (Mass.); *Lycoming Ins. Co. v. Ward*, 90 Ill. 545.

RULE 14.

Policy May Make Payment of Premium Condition Precedent.

When the policy in terms provides that the company shall not be liable, or that it shall not take effect until the premium be actually paid, it is binding upon the insured;¹ so policy may provide for payment of the premium upon the first day of a certain month in each year, and that the company shall not be liable while a premium is due and unpaid, but each premium

covers an entire year from the date of the policy, so that the company cannot claim a forfeiture for non-payment of a premium which became due before the expiration of such year.²

1. *Moore v. Rockford Ins. Co.*, 90 Iowa, 636, 57 N. W. Rep. 597, 23 Ins. L. J. 620; *German Ins. Co. v. Shader*, 96 N. W. Rep. 604 (Nebr.). And see *Bradley v. Potomac Ins. Co.*, 32 Md. 108; *Mulrey v. Shawmut Ins. Co.*, 4 Allen, 116 (Mass.).

2. *Kimbrow v. Continental Ins. Co.*, 101 Tenn. 245, 47 S. W. Rep. 413.

Some policies contain a specific clause or condition providing for forfeiture of the insurance if a note given for the premium is not paid, and same is enforced by the courts.

Palmer v. Continental Ins. Co., 132 Cal. 68, 64 Pac. Rep. 97; *Palmer v. Continental Ins. Co.*, Cal. , 61 Pac. Rep. 784; *Ohio Farmers' Ins. Co. v. Wilson*, 70 Ohio St. 354, 71 N. E. Rep. 715; *Antes v. State Ins. Co.*, 61 Nebr. 55, 84 N. W. Rep. 412; *Houston v. Farmers' Ins. Co.*, 64 Nebr. 138, 89 N. W. Rep. 635; *Hooker v. Continental Ins. Co.*, Nebr. , 96 N. W. Rep. 663; *Carlock v. Phoenix Ins. Co.*, 38 Ill. App. 283; *Dale v. Continental Ins. Co.*, 95 Tenn. 38, 31 S. W. Rep. 266, 25 Ins. L. J. 10; *Jefferson Ins. Co. v. Murray*, Ark. , 86 S. W. Rep. 813; *Mooney v. Home Ins. Co.*, 80 Mo. App. 192; *Harle v. Council Bluffs Ins. Co.*, 71 Iowa, 401; *Moore v. Continental Ins. Co.*, 107 Ky. 273, 53 S. W. Rep. 652; *Potter v. Continental Ins. Co.*, 107 Ky. 326, 53 S. W. Rep. 669; *Continental Ins. Co. v. Browning*, 114 Ky. 183, 70 S. W. Rep. 660; *Walls v. Home Ins. Co.*, 114 Ky. 611, 71 S. W. Rep. 650; *Home Ins. Co. v. Wood*, 72 S. W. Rep. 15 (Ky.), though subject to waiver; *Home Ins. Co. v. Holder*, 74 S. W. Rep. 267 (Ky.); *Alexander v. Continental Ins. Co.*, 67 Wis. 422; *Carlock v. Phoenix Ins. Co.*, 38 Ill. App. 283; *Texas Ins. Co. v. Knights of Tabor*, 32 Tex. Civ. App. 328, 74 S. W. Rep. 809.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver."

RULE 15.

Effect of Giving Credit for Premium.

Where credit is given for the premium, the failure of the assured to pay it within a definite or at a fixed time does not work a forfeiture of the policy in ab-

sence of any provision in it to that effect;¹ and so it is no defense if the assured fails to pay a note given for the premium, there being no provision in the policy making actual payment of the premium a condition precedent, or default in payment a cause of forfeiture;² rule is otherwise when the policy contains such a provision.³

1. *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 212, 44 N. E. Rep. 558; rehearing denied, 44 N. E. Rep. 940. And see *Huggins Cracker Co. v. People's Ins. Co.*, 41 Mo. App. 530.

2. *Barracliff v. Trade Ins. Co.*, 45 N. J. L. 543.

3. *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188, 13 Ins. L. J. 216; *Robinson v. Continental Ins. Co.*, 76 Mich. 641, 43 N. W. Rep. 647; *Barnes v. Continental Ins. Co.*, 30 Mo. App. 539. And see Rule 14, note.

RULE 16.

Effect of Option to Take Policy on Payment of Premium.

An option of taking a policy at any time during the month by paying the premium thereon is not an extension of credit but is rather a direct refusal of credit. The option cannot be exercised after the property is destroyed.

Home Ins. Co. v. Field, 42 Ill. App. 392.

RULE 17.

Provision in Policy Modified by Usual Course of Business.

A provision in a policy to the effect that it shall be void if the insured has not paid the premium is or may be modified by usual course of business in pay-

ment of same after delivery of the policy and even after the fire.

Lebanon Ins. Co. v. Hoover, 113 Pa. St. 591. And see *Long v. North British Ins. Co.*, 137 Pa. St. 335; *Universal Ins. Co. v. Block*, 109 Pa. St. 535; *Riley v. Commonwealth Ins. Co.*, 110 Pa. St. 144.

RULE 18.

Effect of Acknowledgment in Policy of Receipt of Premium.

If a policy delivered in terms contains an acknowledgment of the receipt of the premium it is not conclusive upon the insurance company, which may still show that it has not been paid;¹ but it may operate as an estoppel preventing the company from alleging a want of consideration,² or from setting up as a defense the nonpayment of the premium,³ or from assailing the legal existence of the policy.⁴

1. *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460; *Dircks v. German Ins. Co.*, 34 Mo. App. 31. And see *Western Assur. Co. v. Provincial Ins. Co.*, 5 Tupper, 190 (Can.).

2. *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59.

3. *Basch v. Humboldt Ins. Co.*, 6 Vroom, 429 (N. J.); *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737.

4. *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. Rep. 118. And see *Universal Ins. Co. v. Block*, 109 Pa. St. 535. Also Rule 7.

RULE 19.

When Insured Agent to Receive Premium.

If the insured is himself an agent to receive or collect premiums, payment to himself as such agent may not bind the company;¹ but when it is so mutually understood the agent crediting the company with the premium in his accounts operates as payment.²

1. *Harle v. Council Bluffs Ins. Co.*, 71 Iowa, 401, 32 N. W. Rep. 396.

2. *Lungstrass v. German Ins. Co.*, 48 Mo. 201.

RULE 20.

Payment as Affected by an Account.

Premium may be paid in legal effect by the company's agent crediting the amount to the insured and being himself charged with same in an account with and by the company;¹ and so when the agent has money of the insured in his hands he may charge the premium against such account, and if he does, it may be the equivalent of payment;² but when the insured has not in fact paid the premium, a mere matter or regulation of accounts as between the company and its agent, without the request, knowledge, or privity of the insured, even if it be called a payment, it is not one of which the insured can take advantage.³

1. *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598. And see *Planters' Ins. Co. v. Ray*, 52 Miss. 325; *Pennsylvania Ins. Co. v. Carter*, Pa. St. , 11 Atl. Rep. 102; *Huggins Cracker Co. v. People's Ins. Co.*, 41 Mo. App. 530; *Mooney v. Home Ins. Co.*, 80 Mo. App. 192.

2. *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362 (Va.); *Phoenix Ins. Co. v. Meier*, 28 Nebr. 124, 44 N. W. Rep. 97. And see *Jones v. Ætna Ins. Co.*, 8 Ins. L. J. 415 (U. S. Cir.).

3. *Van Wert v. St. Paul F. & M. Ins. Co.*, 90 Hun, 465. And see this volume, "Cancellation."

RULE 21.

When Premium is Returnable.

If the policy is void when issued and no risk ever attaches, in the absence of fraud, no premium is earned, and if paid, the insured is entitled to recover same back from the insurance company;¹ when policy is obtained by fraudulent misrepresentations, and

never attaches for that reason no premium is returnable.²

1. *Jones v. Insurance Co. N. A.*, 90 Tenn. 604, 18 S. W. Rep. 260, 21 Ins. L. J. 377; *Clark v. Manufacturers' Ins. Co.*, 2 Woodb. & Min. 472 (U. S. Cir.); *Waller v. Northern Ins. Co.*, 64 Iowa, 101. And see 10 Fed. Rep. 232; *Hawke v. Niagara District Ins. Co.*, 23 Grant Ch. 139 (Can.); *Mulrey v. Gore District Ins. Co.*, 25 Up. Can. Q. B. 424.

2. *Friesmuth v. Agawam Ins. Co.*, 10 Cush. 587 (Mass.).

RULE 22.

When Officer or Agent Personally Liable for Return of Premium.

An officer of an insurance company who issues policies and receives premiums, knowing that his company has not complied with statutory requirements authorizing its organization, is guilty of fraud, and personally liable for the payment of the premiums;¹ and so an agent of a foreign company who receives a premium after he knows of revocation of its license, may be personally liable to the insured for its return.²

1. *Belding v. Floyd*, 17 Hun, 208 (N. Y.).

2. *McCutcheon v. Rivers*, 68 Mo. 122.

RULE 23.

Company Bound by Condition Imposed on Delivery of Note for Premium.

When a note is given by the assured for the premium upon condition that it should be returned in case of the rejection or nonacceptance of the policy, and the policy is rejected, the company is bound by the condition, and cannot claim that its agent's agreement was without authority and sue on the note.

Jacoway v. Insurance Co., 49 Ark. 320.

RULE 24.

When Insured not Liable for Earned Premium on Surrender for Cancellation.

The insured is not liable to the insurance company for the earned premium due on its immediate surrender by him and cancellation on demand for the premium, when such policy is obtained by a third party under an independent obligation to keep the property insured for his benefit, there being no privity of contract as between the insured and the company to pay the premium; rule may be otherwise if the insured retains or accepts the policy with knowledge of the facts.

Northern Assur. Co. v. Goelet, 69 App. Div. 108, 74 N. Y. Supp. 553, aff'g 31 Misc. 361, 65 N. Y. Supp. 403.

RULE 25.

Effect of Acceptance of Premium After a Loss.

Acceptance of the premium after a loss, becomes evidence of a waiver of objection or forfeiture, for nonpayment;¹ and so where it is accepted after a fire, with knowledge of the facts, it may become evidence of a waiver of forfeiture on other grounds,² but not when policy by specific language provides in effect for collection of the premium without prejudice,³ or a note given for balance of a premium due, is paid after a loss.⁴ A mere demand for the premium does not waive a forfeiture for nonpayment.⁵ An entry or charge for premium in books of another agent is not the equiva-

lent of acceptance and cannot be claimed to operate as an estoppel.⁶

1. *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84; *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 38 N. E. Rep. 417; *Western Home Ins. Co. v. Richardson*, 40 Nebr. 1, 58 N. W. Rep. 597, 23 Ins. L. J. 501; *Smith v. St. Paul F. & M. Ins. Co.*, 3 Dak. 80. And see *Phenix Ins. Co. v. Lansing*, 15 Nebr. 494.

2. *Continental Ins. Co. v. Busby*, 3 Tex. Ct. App. Civ. Cas., § 101, 15 Ins. L. J. 736; *Mershon v. National Ins. Co.*, 34 Iowa, 87; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. Rep. 229; *Southern Ins. Co. v. Hannah*, Miss. , 37 So. Rep. 506.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 45.

3. *Curtin v. Phoenix Ins. Co.*, 78 Cal. 619, 21 Pac. Rep. 370.

4. *Shimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354, aff'g 26 Ill. App. 254, 16 N. E. Rep. 229.

5. *Cohen v. Continental Ins. Co.*, 67 Tex. 325, 3 S. W. Rep. 296.

6. *McElroy v. British America Ins. Co.*, 88 Fed. Rep. 863, 28 Ins. L. J. 112.

And acceptance by company's agent with knowledge of the facts, after he has remitted or advanced the premium to the company, does not amount to waiver when the policy was procured by fraudulent misrepresentation. *American Central Ins. Co. v. Antram*, Miss. , 38 So. Rep. 626.

RULE 26.

In Suit upon Policy Company Entitled to Credit for Unpaid Premium.

If the premium is not paid at time of the fire, and suit is brought upon the policy, without same having been paid, the insurance company is entitled to credit for the unpaid premium.

Home Ins. Co. v. Adler, 71 Ala. 516.

TITLE V.**Term.**

- RULE** 1. As imposed by contract.
 2. Construction of the words "at noon."
 3. Burden of proof as to alteration in date of expiration.
 4. Effect of omission of date of expiration.
 5. Term may be governed by description.
 6. Continuance in force by special agreement.
 7. Delivery of policy may be conditional as to time takes effect.
 8. Term may be question of fact.

RULE 1.**As Imposed by Contract.**

Does insure for the term of
 from the day of, 190..., at noon, to
 the day of, 190..., at noon.

The above clause or provision is contained in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

The standard form of policy prescribed in:

Maine,	New Hampshire,
Massachusetts,	South Dakota,
Minnesota,	

provides:

"Said property is insured for the term of beginning on the day of in the year nineteen hundred, at noon, and continuing until the day of in the year hundred and, at noon."

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

* See note to "Concealment," Rule 1, page 2.

RULE 2.

Construction of the words "at noon."

The words "at noon" in the clause stating the term of the insurance, refer to the common or solar time and not to standard railroad time.

Jones v. German Ins. Co., 110 Iowa, 75, 81 N. W. Rep. 188.

And see *Henderson v. Reynolds*, 84 Ga. 159. This rule is subject to parol evidence as to custom. *Rochester German Ins. Co. v. Louisville Lead Co.*, Ky., 87 S. W. Rep. 1115.

RULE 3.

Burden of Proof as to Alteration in Date of Expiration.

When the policy bears no evidence upon its face of any alteration after its issue in the date of its expiration the burden of proof as to such alteration rests upon the insurance company.

Insurance Co. N. A. v. Brim, 111 Ind. 281, 12 N. E. Rep. 315.

RULE 4.

Effect of Omission of Date of Expiration.

The mere omission to insert in the policy the date of expiration or the time it is to run does not affect the liability of the insurance company; the contract is legally operative for at least a reasonable time, and the burden rests upon the insurance company of establishing that it was not in force at time of the fire;¹ the parties may agree as to mode and manner of fixing time when insurance should terminate.²

1. *Schroeder v. Traders' Ins. Co.*, 109 Ill. 157, 13 Ins. L. J. 492. (In this case the fire occurred fourteen days after issue of the policy.)

2. *Imboden v. Detroit F. & M. Ins. Co.*, 31 Mo. App. 321.

RULE 5.

Term May be Governed by Description.

The term as stated in the policy may be governed or qualified by specific language of the description of the risk or of property insured; for instance, if policy covers a hophouse "while drying hops," the insurance ceases when the insured ceases drying hops.

Langworthy v. Oswego Ins. Co., 85 N. Y. 632, 10 Ins. L. J. 546.

RULE 6.

Continuance in Force by Special Agreement.

When, by special agreement, a policy is to continue in force after date of expiration until notice of discontinuance, the assured to pay *pro rata* for the time, the sending of a check for an additional month's insurance is not the equivalent of a notice of discontinuance at the end of that month.

Greenwich Ins. Co. v. Providence Steamship Co., 119 U. S. 481.

RULE 7.

Delivery of Policy May be Conditional as to Time it Takes Effect.

The delivery of the policy may be made conditional as to the time it takes effect, notwithstanding its date;¹ though ordinarily the risk commences as specified by the date in the policy.²

1. Atlantic Ins. Co. v. Goodall, 35 N. H. 328.

2. Hubbard v. Hartford Ins. Co., 33 Iowa, 325. And see this volume, title "Oral or Parol Contract."

RULE 8.

Term May be Question of Fact.

When a policy is written by the company's agent for a term of three years, and the company, in defense

to an action at law to recover a loss thereunder, claims that the policy was only for one year, that premium was paid for only one year, and that the agent had made a mistake in writing three years, and that the assured knew it was a mistake, and the assured testifies that the policy was in same condition when he received it, that he accepted it in good faith for three years, and knew nothing of any mistake, the question of a contract for three years is for the jury.

Davidson v. Guardian Assur. Co., 176 Pa. St. 525, 35 Atl. Rep. 220.

TITLE VI.

Reinsurance.

- RULE**
1. As imposed by contract.
 2. Insurable interest.
 3. No privity of contract between original insured and reinsurer — Exception.
 4. When original insured may have right of action against either company.
 5. Subject-matter same — Interest different — Compliance with condition as to proof of loss.
 6. Effect of reinsurance contract being made subject to same conditions as adopted by reinsured company.
 7. Construction of the word "risk" in a reinsurance contract.
 8. When evidence of usage or custom not admissible.
 9. Description furnished by reinsured company as affecting construction.
 10. Construction of reinsurance contract.
 11. Construction of clause making loss payable at same time with reinsured — Of the words "may pay."
 12. Effect of clause making loss payable "*pro rata*."
 13. Not within statute of frauds.
 14. Misrepresentation and concealment.
 15. No recovery against reinsurer when reinsured company not liable.
 16. Power of reinsured to consent to assignment of its policy.

- Rule 17. Reinsurer may have right to consent to assignment of original policy.
18. Reinsured cannot consent to increase of risk.
 19. Right to assume control of litigation.
 20. Construction of "building" under a reinsurance contract.
 21. When policy not covered by reinsurance.
 22. Effect of coinsurance clause in original policy.
 23. Printed conditions as to appraisal and limitation not applicable.
 24. Liability not affected by apportionment clause in policy.
 25. Liability as affected by insolvency of reinsured company.
 26. Purchase of claims by company or its receiver.
 27. Right of individual underwriter Lloyds policy to enforce contract of reinsurance.
 28. Construction of contract with company retiring from business.
 29. Agent of company cannot act in double capacity.
 30. Personal liability of directors of insolvent company.
 31. Unless otherwise provided reinsured is not obliged to first pay loss before claiming reinsurance.
 32. Compromise and settlement by reinsured company.
 33. When proof of loss dispensed with, and adjustment as to amount binding.
 34. When reinsurer bound by adjustment.

RULE 1.

As Imposed by Contract.

Liability for reinsurance shall be as specifically agreed hereon.

This rule is imposed by above terms in the standard form of policy prescribed in:

New York,	North Carolina,
Connecticut,	North Dakota,
Louisiana,	*Pennsylvania,
Michigan,	Rhode Island,
Missouri,	Wisconsin.
New Jersey,	

* See note to "Concealment," Rule 1, page 2.

The standard form of policy prescribed in:

Maine,
Massachusetts,
Minnesota,

New Hampshire,
South Dakota,

does not contain any such provision.

In the States where no standard form is prescribed, and other than those above named, the New York standard form is in general use.

RULE 2.

Insurable Interest.

The insurance company which issues the original policy has such insurable interest as to sustain a contract of reinsurance by another company, to the whole extent of its liability;¹ and so the reinsuring company has an insurable interest.²

Insurance Co. N. A. v. Hibernia Ins. Co., 140 U. S. 565, 11 Sup. Ct. Rep. 909, 20 Ins. L. J. 689; *Manufacturers' Ins. Co. v. Western Assur. Co.*, 145 Mass. 419, 14 N. E. Rep. 632; *Sun Ins. Office v. Merz*, 63 N. J. L. 365, 43 Atl. Rep. 693. And see *New York Bowery Ins. Co. v. New York Ins. Co.*, 17 Wend. 359 (N. Y.); *Goodrich's Appeal*, 109 Pa. St. 523; *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59.

2. *Yonkers Ins. Co. v. Hoffman Ins. Co.*, 6 Robt. 316 (N. Y.).

RULE 3.

No Privity of Contract Between Original Insured and Reinsurer — Exception.

There is no privity of contract between the reinsuring company and the insured in the original policy, and hence in absence of express terms in the reinsurance contract such original insured cannot maintain any action on the reinsurance contract;¹ when the reinsurance contract in terms assumes or agrees to pay the original insured, latter may maintain suit thereon;²

when policy is issued directly to the original insured it cannot be claimed to be a reinsurance contract.³

1. *Carrington v. Commercial Ins. Co.*, 1 Bosw. 152 (N. Y.); *Herckenrath v. American Ins. Co.*, 3 Barb. Ch. 63 (N. Y.); *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. D. 151, 45 N. W. Rep. 703, 19 Ins. L. J. 636. And see *Goodrich's Appeal*, 109 Pa. St. 523. *Contra*, *Shoaf v. Palatine Ins. Co.*, 127 N. C. 308, 37 S. E. Rep. 451.

2. *Travelers' Ins. Co. v. California Ins. Co.*, *supra*; *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50, 15 Ins. L. J. 449; *Ruohs v. Traders' Ins. Co.*, Tenn. , 78 S. W. Rep. 85. And see Rule 4.

3. *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343.

RULE 4.

When Original Insured May have Right of Action Against Either Company.

When an insurance company issues a policy to the insured and subsequently reinsures the risk with another company, which reinsurance contract includes an express promise to pay the insured any loss which might be suffered, and the reinsuring company becomes insolvent and the insured files his claim to the insurance with its assignee, these facts constitute no defense in action by the insured upon the first policy; the insured has a right of action against either company, although he can have but one satisfaction.

Barnes v. Hekla Ins. Co., 56 Minn. 38, 57 N. W. Rep. 314, 23 Ins. L. J. 305.

RULE 5.

Subject-Matter Same — Interest Different — Compliance with Condition as to Proof of Loss.

The subject-matter of the insurance is the same in the policy of reinsurance as in the original insurance,

though the interest is different. The condition in the reinsurance policy as to the furnishing of the statement or proof of loss is complied with by the first company delivering or transmitting to the reinsurer the proofs made by the original insured.

New York Bowery Ins. Co. *v.* New York Ins. Co., 17 Wend. 359 (N. Y.).

And see Vol. 1, Fire Insurance as a Valid Contract, "Statement or Proof of Loss," Rule 31.

RULE 6.

Effect of Reinsurance Contract Being Made Subject to Same Conditions as Adopted by Reinsured Company.

When the policy or contract of reinsurance provides that it is subject to the same conditions as are or may be adopted by the company reinsured, the reinsuring company binds itself by what might be adopted by the reinsured company, properly pertaining to the risk, such as a consent to a transfer or change in title and assignment of the policy.

Manufacturers' Ins. Co. *v.* Western Assur. Co., 145 Mass. 419, 14 N. E. Rep. 632.

RULE 7.

Construction of the Word "Risk" in a Reinsurance Contract.

When an open policy of reinsurance is indorsed "on and after this date this policy covers the Insurance Company as reinsurance to the extent of one-half the amount of each and every *risk* which equals or exceeds in value the sum of \$15,000;" the word "*risk*" refers to the written or entered value in each case and not to that fixed after a loss by adjustment.

Continental Ins. Co. *v.* Ætna Ins. Co., 138 N. Y. 16, 33 N. E. Rep. 724, 22 Ins. L. J. 501.

RULE 8.**When Evidence of Usage or Custom not Admissible.**

When the words of a reinsurance contract are plain, certain, and unambiguous, evidence of usage or custom is not admissible to affect their meaning and application;¹ parol evidence is not admissible, in such a case, to vary, modify, or change the terms of the contract.²

1. *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137, aff'd, 2 N. Y. 235. And see *Imperial Marine Ins. Co. v. Fire Ins. Co.*, L. R. 4 C. P. Div. 166 (Eng.).

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rules 21 to 25.

2. *Home Ins. Co. v. Continental Ins. Co.*, 89 App. Div. 1, 85 N. Y. Supp. 262; prior appeal, 62 App. Div. 63, aff'd, 180 N. Y. 389, 73 N. E. Rep. 65.

RULE 9.**Description Furnished by Reinsured Company as Affecting Construction.**

When the description of the risk in a reinsurance policy is prepared and furnished by the reinsured company, any ambiguity therein in construction of same is solved against the reinsured company as being the party who caused it.

London Assur. Co. v. Thompson, 170 N. Y. 94, 62 N. E. Rep. 1066.

RULE 10.**Construction of Reinsurance Contract.**

When the policy of reinsurance provides that it is "subject to the same risks, conditions, mode of settlement, and, in case of loss, payable at the same time and in the same manner as the policies reinsured," it

does not mean that the terms of the reinsured policies as to risks, conditions, mode of settlement, time and manner of payment in case of loss, and limitations, are incorporated in and made part of the contract of reinsurance, but that the original policies furnish in these particulars the basis on which the reinsurance contract stands, and that in all the dealings with the original insured the provisions of the policy issued to him shall be observed.

Faneuil Hall Ins. Co. *v.* Liverpool, L. & G. Ins. Co., 153 Mass. 63, 26 N. E. Rep. 244, 20 Ins. L. J. 289, 10 L. R. A. 423.

RULE II.

Construction of Clause Making Loss Payable at Same Time with Reinsured — Of the Words “May Pay.”

When the reinsurance contract provides that it is payable at the same time with the reinsured, such clause refers to time of payability and not to the fact of payment, and fixes the same period for the duty of payment by the reinsurer as was fixed for payment by the reinsured;¹ it is not necessary that actual payment precede or accompany payment by the reinsurer;² when loss is payable at such time and in such manner as the reinsured company “may pay,” the words “may pay” are equivalent to liable to pay.³

1. *Blackstone v. Allemania Ins. Co.*, 56 N. Y. 104; *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59.

2. *Consolidated Real Estate Co. v. Cashow*, *supra*. And see *Gantt v. American Central Ins. Co.*, 68 Mo. 503; *Cass County v. Mercantile Ins. Co.*, Mo. , 86 S. W. Rep. 237; *Fame Ins. Co.’s Appeal*, 83 Pa. St. 396.

3. *Fame Ins. Co.’s Appeal*, *supra*.

RULE 12.

Effect of Clause Making Loss Payable "Pro Rata."

If the reinsurance contract is for one-half of the original amount, and provides that the "loss, if any, payable *pro rata* at the same time with the reinsured," and the loss is less than the amount of the original insurance, the reinsuring company is liable only to pay such proportion of the amount of the loss as is in the ratio of the amount of reinsurance to the amount originally insured, or one-half;¹ if there is no provision for prorating the loss or otherwise limiting liability, the reinsuring company is liable for the whole amount of its policy, without reference to the proportion paid by the reinsured company.²

1. *Blackstone v. Allemania Ins. Co.*, 56 N. Y. 104; *Home Ins. Co. v. Continental Ins. Co.*, 62 App. Div. 63, 70 N. Y. Supp. 824; subsequent appeal, 89 App. Div. 1, 85 N. Y. Supp. 262, *aff'd*, 180 N. Y. 389, 73 N. E. Rep. 65; *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59. And see *Illinois Mutual Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362; *Norwood v. Resolute Ins. Co.*, 4 Jones & Sp. 552 (N. Y.); *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124, 14 Ins. L. J. 546.

2. *Detroit F. & M. Ins. Co. v. Commercial Ins. Co.*, 38 Ohio St. 11, 11 Ins. L. J. 549.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Amount of Loss or Damage," Rule 32.

RULE 13.

Not Within Statute of Frauds.

A reinsurance contract is not within the statute of frauds in requiring a writing as assuming payment of a debt, or on default of another.

Bartlett v. Firemen's Fund Ins. Co., 77 Iowa, 155.

RULE 14.

Misrepresentation and Concealment.

A reinsurance contract, like any other insurance contract, is rendered void by the material misrepresentation¹ or concealment² of the reinsured company; but misrepresentation cannot be predicated upon mere description or representation of the risk reinsured when that is correctly stated.³

1. *Louisiana Mutual Ins. Co. v. New Orleans Ins. Co.*, 13 La. Ann. 246.

2. *New York Bowery Ins. Co. v. New York Ins. Co.*, 17 Wend. 359 (N. Y.).

3. *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124, 14 Ins. L. J. 546.

RULE 15.

No Recovery Against Reinsurer when Reinsured Company not Liable.

When the reinsured company is not liable on the original policy, a recovery cannot be had against the reinsurer company which may make every defense the reinsured could make, when the loss remains unadjusted between the reinsured and the party originally insured on the terms and conditions of the policy.

Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443. And see *Ex parte Norwood*, 3 Biss. 504 (U. S. Cir.); *Cashan v. Northwestern Nat. Ins. Co.*, 5 Biss. 476 (U. S. Cir.).

RULE 16.

Power of Reinsured to Consent to Assignment of its Policy.

The reinsured company has power to consent to the transfer of its policy according to its provisions, unless there is some provision in the reinsurance con-

tract or policy expressly forbidding it;¹ even if the reinsuring company is made the agent of the original insurer for such purpose, that does not make it the sole agent, or prevent the original insurer from consenting to a transfer.²

1. *Faneuil Hall Ins. Co. v. Liverpool, L. & G. Ins. Co.*, 153 Mass. 63, 26 N. E. Rep. 244, 20 Ins. L. J. 289.

2. *Faneuil Hall Ins. Co. v. Liverpool, L. & G. Ins. Co.*, *supra*.

RULE 17.

Reinsurer May have Right to Consent to Assignment of Original Policy.

When the reinsuring company, by agreement, has the right to consent to an assignment of the original policy, such consent is binding in a subsequent suit by the insured against the reinsured company.

Chauncey v. German-American Ins. Co., 60 N. H. 428.

RULE 18.

Reinsured Cannot Consent to Increase of Risk.

The reinsured company has no right to consent to an increase of the risk without the consent of the reinsuring company, and if it does, the reinsurance policy becomes void.

St. Nicholas Ins. Co. v. Merchants' Ins. Co., 83 N. Y. 604.

RULE 19.

Right to Assume Control of Litigation.

When the reinsuring company is notified of an action against the reinsured company upon the original policy, it has the right to assume control of the

litigation in protection of its own interests, and if it does not do so it is bound by the result of the litigation, in absence of proof of fraud, bad faith, or collusion on part of the reinsured company.

Gantt v. American Central Ins. Co., 68 Mo. 503; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289. And see *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124, 14 Ins. L. J. 546; *Cass County v. Mercantile Ins. Co.*, Mo. , 86 S. W. Rep. 237.

RULE 20.

Construction of "Building" under a Reinsurance Contract.

When a reinsurance contract limits liability to a certain amount in "any one building or risk," a warehouse, with common outer wall, and partition walls, dividing the building into several parts designated as "stores Nos. 1, 2, and 3, respectively," but connecting and communicating by doors in each wall, and devoted to same use, and under one management, constitutes only one building.

German-Amer. Ins. Co. v. Commercial Ins. Co., Ala. , 11 So. Rep. 117, 21 Ins. L. J. 626. And see Vol. I, *Fire Insurance as a Valid Contract*, "Location" and "Description."

RULE 21.

When Policy not Covered by Reinsurance.

When a policy of reinsurance is expressed to be "a reinsurance of policy or policies (blank not filled) and subject to same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon," and the assured has two policies in force when this reinsurance is effected, and these two policies having terminated and a new one issued, dif-

fering in material respects, under which a loss and claim occurs, this last policy is not covered by the reinsurance.

Lower Rhine & Wurtemberg Ins. Assoc. v. Sedgewick (1899), 1 Q. B. 179, rev'g (1898) 1 Q. B. 739.

RULE 22.

Effect of Coinsurance Clause in Original Policy.

When the property the reinsured company has insured is described as "cotton subject to coinsurance clause," and the policy of reinsurance provides that it should be subject to the same risks, conditions, valuations, indorsements, assignments, and mode of settlement as might be assumed or adopted by the reinsured company, the reinsuring company is liable for the loss suffered by the reinsured company on its policies without the coinsurance clause as well as those containing it.

Imperial Ins. Co. v. Home Ins. Co., 68 Fed. Rep. 698, 30 U. S. App. 409, 15 C. C. A. 609.

RULE 23.

Printed Conditions as to Appraisal and Limitation not Applicable.

Such clauses or conditions in the usual printed forms or policies as those relating to appraisal or award and prescribing the time in which suit must be brought are not applicable to a contract of reinsurance.

Jackson v. St. Paul F. & M. Ins. Co., 99 N. Y. 124, 14 Ins. L. J. 546; *Alker v. Rhoades*, 73 App. Div. 158, 76 N. Y. Supp.

808. And see *Insurance Co. of Pa. v. Telfair*, 27 Misc. 247. *Contra*, *Victoria Ins. Co. v. Home Ins. Co.*, 35 Can. S. C. 208, where the limitation clause was held binding by a divided court.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Limitation as to Suit or Action," Rule 4.

RULE 24.

Liability not Affected by Apportionment Clause in Policy.

The liability of the reinsuring company is not affected or reduced by the apportionment clause or condition in the policy, as that must be construed to refer to a case where there is other reinsurance.

Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235.

RULE 25.

Liability as Affected by Insolvency of Reinsured Company.

Under its contract of reinsurance, the extent of the liability of the reinsuring company is not affected by the insolvency of the reinsured company nor by its inability to fulfill its own contract with the original insured.

Blackstone v. Allemania Ins. Co., 56 N. Y. 104; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137, aff'd, 2 N. Y. 235; *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Hunt v. New Hampshire Ins. Co.*, 68 N. H. 305, 38 Atl. Rep. 145. And see *Goodrich's Appeal*, 109 Pa. St. 523; *Ex parte Norwood*, 3 Biss. 504 (U. S. Cir.); *Cashan v. Northwestern Nat. Ins. Co.*, 5 Biss. 476 (U. S. Cir.).

RULE 26.

Purchase of Claims by Company or its Receiver.

The reinsuring company may purchase claims under the policies reinsured by it, and set off the amount

of such claims against its liability under the policy or contract of reinsurance;¹ and so an insurance company, or its receiver, when claim is made for insurance upon a policy issued by it, and when the question of its liability is not clear, may purchase and take by assignment a claim for the insurance upon the property issued by another company and enforce the same.²

1. *Hovey v. Home Ins. Co.*, 3 Ins. L. J. 815, 13 Am. Law Reg. N. S. 511 (U. S. Cir.).

2. *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343.

RULE 27.

Right of Individual Underwriter Lloyds Policy to Enforce Contract of Reinsurance.

An individual underwriter upon a Lloyds policy cannot maintain an action upon a contract of reinsurance with the association by another company, without joining with him the other members of the association; all of the parties interested in the recovery must be before the court.

Thompson v. Colonial Assur. Co., 60 App. Div. 325, 70 N. Y. Supp. 85.

RULE 28.

Construction of Contract with Company Retiring from Business.

An insurance company going out of business which contracts with another company to the effect that it would discharge its own outstanding obligations, while the latter company is to assume its trade, contingent liabilities and good-will, is not relieved from liability for a loss occurring before the making of the contract.

Olsen & Walke v. California Ins. Co., 11 Tex. Civ. App. 371, 32 S. W. Rep. 446.

RULE 29.

Agent of Company Cannot Act in Double Capacity.

An agent of two companies acting in a dual or double capacity as such agent cannot make a valid contract of reinsurance without the consent, express authority, or ratification of his principal.

Empire State Ins. Co. v. American Central Ins. Co., 138 N. Y. 446, aff'g 64 Hun, 485, 19 N. Y. Supp. 504; *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132 (N. Y.). And see this volume, title "Agents."

RULE 30.

Personal Liability of Directors of Insolvent Company.

While the directors of an insolvent insurance company may render themselves personally liable under the provisions of a statute imposing such liability when they transfer the assets in contemplation of insolvency with intent to give preference to particular creditors, by reinsuring a certain part or class of the policies issued by the company, and paying the premium therefor out of its assets, upon recovery from them it is proper to deduct from the amount so paid for the reinsurance, the sum which the company or its receiver would have been obliged to pay to the holders of the reinsured policies under which losses had occurred.

Casserly v. Manners, 9 Hun, 695.

RULE 31.

Unless Otherwise Provided Reinsured is not Obligated to First Pay Loss Before Claiming Reinsurance.

In absence of restraining or governing words to the contrary in the reinsurance contract, the reinsured is not obliged, in order to maintain an action against the reinsurer, to show that it has paid the loss. It may at once resort to an action against the reinsurer, and to such action the reinsurer may make the same defenses which the reinsured could make against the original insured, or the reinsured may wait suit by the original insured against it, and when it is brought, give notice of it to the reinsuring company, and if subjected to damages, it may recover them, with the costs and expenses of the litigation of the reinsuring company.

Gantt v. American Central Ins. Co., 68 Mo. 503. And see *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; *New York Central Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468, rev'd on another point, 14 N. Y. 85; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137, aff'd, 2 N. Y. 235; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124, 14 Ins. L. J. 546.

RULE 32.

Compromise and Settlement by Reinsured Company.

When it is understood and agreed that the reinsured company shall defend the claim made against it by the original insured, and is authorized to do so by the reinsuring company, the former cannot effect a compromise and settlement, binding upon the latter, without its knowledge and consent.

Commercial Union Assur. Co. v. American Central Ins. Co., 68 Cal. 430.

RULE 33.

When Proof of Loss Dispensed with, and Adjustment as to Amount Binding.

When the reinsurance contract or policy provides that it is "subject to same risks, valuations, conditions, and mode of settlement as are or may be adopted or assumed" by the reinsured company, it dispenses with preliminary proof as between them, and the reinsuring company is bound by the settlement and adjustment made by the reinsured company and the original insured as to the amount of the loss.

Consolidated Real Estate Co. *v.* Cashow, 41 Md. 59.

RULE 34.

When Reinsurer Bound by Adjustment.

When a contract of reinsurance provides that it is subject to the same risks, valuations, indorsements (excepting transfers of location), and conditions as the original insurance, and loss, if any, to be settled and paid *pro rata* with the reinsured, and at the same time and place, and upon the same conditions," the reinsuring company being notified of a loss, is bound by an adjustment subsequently made between the original insured and the reinsured company, specially when it is customary for the reinsurer to pay the reinsured its proportion of the adjustment expenses; the reinsurer cannot escape liability unless it is alleged and proved that the reinsured company has acted fraudulently or collusively to its injury.

Insurance Co. State of New York *v.* Associated Manufacturers' Ins. Co., 70 App. Div. 69, 74 N. E. Supp. 1038, *aff'd*, 174 N. Y. 541, without opinion. And see Consolidated Real Estate Co. *v.* Cashow, 41 Md. 59.

TITLE VII.**Oral or Parol Contract — Consummation of Contract.**

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RULE I.

Parol Contract of Insurance Legally Operative and Binding
— Exceptions.

An oral or parol contract of fire insurance is legally operative and binding upon the parties to it;¹ unless required by a statute,² or charter,³ to be expressed in writing.

1. *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275; *Fire Ins. Co. Philadelphia v. Sinsabaugh*, 101 Ill. App. 55; *Continental Ins. Co. v. Roller*, 101 Ill. App. 77, 79; *Fire Assoc. v. Smith*, 59 Ill. App. 655; *Goodhue v. Hartford Ins. Co.*, 175 Mass. 187, 55 N. E. Rep. 1039; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. Rep. 883; *Phoenix Ins. Co. v. Hale*, 67 Ark. 433, 55 S. W. Rep. 486; *Phoenix Ins. Co. v. Ireland*, 9 Kans. App. 644, 58 Pac. Rep. 1024; *Vining v. Franklin Ins. Co.*, 89 Mo. App. 311; *Western Assur. Co. v. McAlpine*, 23 Ind. App. 220, 55 N. E. Rep. 119; *Reynolds v. Westchester Ins. Co.*, 8 App. Div. 193, 40 N. Y. Supp. 336; *Van Loan v. Farmers' Ins. Co.*, 90 N. Y. 280; *Northam v. Dutchess Co. Ins. Co.*, 177 N. Y. 73, 69 N. E. Rep. 222; *Post v. Ætna Ins. Co.*, 43 Barb. 351 (N. Y.); *Springer v. Anglo Nevada Ins. Co.*, 58 Hun. 601; *Security Ins. Co. v. Kentucky Ins. Co.*, 7 Bush, 81 (Ky.); *Commercial Union Assur. Co. v. Urbansky*, 113 Ky. 624, 68 S. W. Rep. 653; *Strohn v. Hartford Ins. Co.*, 33 Wis. 648; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252, 9 Ins. L. J. 577; *Home Ins. Co. v. Adler*, 71 Ala. 516; *McCabe v. Ætna Ins. Co.*, 9 N. D. 19, 81 N. W. Rep. 426; *Fitton v. Fire Ins. Assoc.*, 20 Fed. Rep. 766, 14 Ins. L. J. 923; *Gold v. Sun Ins. Co.*, 73 Cal. 216, 14 Pac. Rep. 786; *City of Davenport v. Peoria Ins. Co.*, 17 Iowa, 276. And see *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. 82 (N. Y.).

2. *Planters' Fire Assoc. v. De Loach*, 113 Ga. 802, 39 S. E. Rep. 466; *Clark v. Brand*, 62 Ga. 23; *McKay v. O'Neill*, 22 N. S. 346. And see *Stoelke v. Hahn*, 55 Ill. App. 497.

3. *Henning v. United States Ins. Co.*, 47 Mo. 425; *Haslett v. Allegheny Ins. Co.*, 4 Ins. L. J. 372 (Pa.). But see and compare *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Security Ins. Co. v. Kentucky Ins. Co.*, 7 Bush, 81 (Ky.); *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371, 10 Ins. L. J. 657. (The distinction seems to be that in the first two cases above cited (under 3), the charter, in terms, required all *contracts* of insurance to be in

writing, and in the last three, the charter required all policies issued should be in writing.)

In *Relief Ins. Co. v. Shaw*, 94 U. S. 574, it was held that a person dealing with a New York company in Massachusetts could not be presumed to know the terms of its charter, which could not limit an agent's authority to make a binding parol contract of insurance.

In *Spitzer v. St. Mark's Ins. Co.*, 6 Duer, 6 (N. Y.), it was held that under company's charter a parol contract to cover property removed to new location was inoperative.

RULE 2.

Essential Elements of the Contract.

To make a valid contract of insurance there must concur these essential conditions: (a) the subject-matter to which the policy is to attach must exist, (b) the risk insured against, (c) the amount of indemnity must be definitely fixed, (d) the duration of the risk, (e) the premium must be agreed upon and paid or exist as a valid charge;¹ if the rate of premium is not definitely known and fixed, but it is understood that it is to be taken from a certain compilation of rates or rate-book, that is capable of definite ascertainment and may be sufficient.²

1. *Worth v. German Ins. Co.*, 64 Mo. App. 583; *Baptist Church v. Brooklyn Ins. Co.*, 28 N. Y. 153; *Hartford Ins. Co. v. Trimble*, Ky. , 78 S. W. Rep. 462; *Eames v. Home Ins. Co.*, 4 Otto, 621 (U. S.); *Insurance Co. N. A. v. Bird*, 175 Ill. 42, 51 N. E. Rep. 686; *People's Ins. Co. v. Paddon*, 8 Bradw. 447 (Ill.); *Cleveland Oil Co. v. Norwich Ins. Soc.*, 34 Oreg. 228, 55 Pac. Rep. 435; *Diver v. Liverpool, L. & G. Ins. Co.*, 9 N. Y. Supp. 482, 17 Ins. L. J. 156. And see *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180; *Penley v. Beacon Ins. Co.*, 7 Grant Ch. 130 (Can.).

2. *Worth v. German Ins. Co.*, 64 Mo. App. 583. And see *Eames v. Home Ins. Co.*, 4 Otto, 621 (U. S.).

RULE 3.

There Must be Meeting of Minds as to Terms and Property.

To make a binding verbal contract of insurance there must be a meeting of the minds between the parties thereto so as to leave nothing to be done thereafter but to execute it as made. The terms and property must be specified;¹ it is only where an agent authorized to make contracts and issue policies binding on the company, makes an agreement complete in every particular, but states that the company might refuse to carry the risk after it was reported, that the court will hold the contract binding until canceled, and notice of the cancellation given to the insured;² negotiation not completed does not constitute a contract.³

1. *J. R. Davis Lumber Co. v. Scottish Union & N. Ins. Co.*, 94 Wis. 472, 69 N. W. Rep. 156; *Mattoon Mfg. Co. v. Oshkosh Ins. Co.*, 69 Wis. 564, 35 N. W. Rep. 12; *Milwaukee Mechanics' Ins. Co. v. Graham*, 80 Ill. App. 549, aff'd, 181 Ill. 158, on opinion below; *Manchester Assur. Co. v. Benson*, 66 Ill. App. 615; *People's Ins. Co. v. Paddon*, 8 Bradw. 447 (Ill.); *Kimball v. Lion Ins. Co.*, 17 Fed. Rep. 625; *Phoenix Ins. Co. v. Schultz*, 80 Fed. Rep. 337, 25 C. C. A. 453; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Vining v. Franklin Ins. Co.*, 89 Mo. App. 311. And see *Agricultural Ins. Co. v. Fritz*, 61 N. J. L. 211, 39 Atl. Rep. 910, 27 Ins. L. J. 710; *Bell v. Peabody Ins. Co.*, 49 W. Va. 437, 38 S. E. Rep. 541.

2. *J. R. Davis Lumber Co. v. Scottish Union & N. Ins. Co.*, *supra*.

3. *German Ins. Co. v. Downman*, 115 Fed. Rep. 481, C. C. A. ; *Continental Ins. Co. v. Jenkins*, 5 Ins. L. J. 514 (Ky.); *Johnson v. Continental Ins. Co.*, 84 Ky. 470; *Haskin v. Agricultural Ins. Co.*, 78 Va. 700; *Sanford v. Trust Ins. Co.*, 11 Paige, 547 (N. Y.).

In *Ganser v. Firemen's Fund Ins. Co.*, 38 Minn. 74, 17 Ins. L. J. 105, it appears to be held that the insured may be allowed to testify that he understood from the negotiation that his property in question was insured.

RULE 4.

What is Necessary to Establish Contract — Evidence — Question of Fact — Remedy.

Before a contract of insurance, or to insure, is binding, all the essential elements and terms of the contract must be understood and mutually assented to. A mere expression of a desire by one intending to procure insurance, or a proposition made to an insurance agent to insure property, and an assent or acceptance by the agent to insure without more, would not amount to a contract of insurance or an agreement to insure. The subject-matter, period, rate to be paid, and amount of insurance and, perhaps, other elements must be agreed upon expressly or by implication before there can be an absolute binding agreement between the parties; nor would the mere fact that there had been previous dealings of insurance between the parties alone, without some reference to such previous dealings, be sufficient to show a completed and binding contract that the parties intended to and did adopt the provisions of the former dealings. Where, however, there exists a contract of insurance, not expired, and there is an agreement between the parties to renew the policy, and no change is suggested or agreed upon, it will be implied that the renewal contract included and adopts all the provisions of the existing contract of insurance. Such a contract is complete in all respects, and upon failure to comply with the agreement, the party offending may be compelled by bill in equity, specifically to perform the agreement, or held liable in a court of law for damages resulting from a breach of the agreement. Where the evidence shows

that the parties contracted with reference to provisions of previous dealings, it is competent to show the terms of such previous dealings, in order to arrive at the intention of the parties and to ascertain all the terms of the contract made; and where the agreement was to renew an existing contract of insurance, it is proper and necessary to admit in evidence such existing contract of insurance. Whether or not there was a parol contract to insure, or a parol contract to renew or of renewal, is a question of fact to be determined by the jury.

Commercial Ins. Co. v. Morris, 105 Ala. 498, 18 So. Rep. 34; *Home Ins. Co. v. Adler*, 71 Ala. 516. And see Rules 23, 52, 54 and 58.

RULE 5.

Construction of Words — Evidence — Presumption.

Plain ordinary words, without any ambiguity, used in a conversation between an applicant and company's agent claimed to constitute a parol contract of insurance must be given their ordinary meaning; if it is claimed they have acquired a special import and meaning in a particular locality among insurance agents, the fact must be established by a preponderance of the evidence, and it must appear that the party or agent using such words understood and intended to use them in their special or technical sense. His knowledge may be presumed from the generality of the understanding of such meaning.

Potter v. Phoenix Ins. Co., 63 Fed. Rep. 382.

RULE 6.

Authority of Agent to Make Parol Contract of Insurance.

A general agent intrusted with blank policies, with authority to fill up, countersign, and deliver the same as effective contracts of insurance, has power to bind "the insurance company by a parol agreement of insurance. If the agent has authority to make a contract of insurance by a policy it is within the scope of such authority to make a binding oral agreement to insure;¹ and to fill up the policy in accordance therewith after a loss;² so a clerk of such general agent may be clothed with authority to bind the company by a parol contract of insurance;³ an agent has no authority to make any contract of insurance on destroyed property or to make agreements to pay for losses already incurred.⁴

1. *Ellis v. Albany City Ins. Co.*, 50 N. Y. 402; *Angell v. Hartford Ins. Co.*, 59 N. Y. 171; *Bell v. Peabody Ins. Co.*, 49 W. Va. 437, 38 N. E. Rep. 541; *Weeks v. Lycoming Ins. Co.*, 7 Ins. L. J. 552 (U. S. Cir.); *Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N. J. L. 674, 54 Atl. Rep. 458, *King v. Phoenix Ins. Co.*, 101 Mo. App. 163, 76 S. W. Rep. 55; *Sanborn v. Firemen's Ins. Co.*, 16 Gray, 448 (Mass.); *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. Rep. 883. And see *McCabe v. Aetna Ins. Co.*, 9 N. D. 19, 81 N. W. Rep. 426.

2. *Insurance Co. v. Colt*, 20 Wall. 560 (U. S.).

3. *Cooke v. Aetna Ins. Co.*, 7 Daly, 555 (N. Y.). And see this volume, title "Agents."

4. *Bently v. Columbia Ins. Co.*, 17 N. Y. 421; *Dodd v. Home Ins. Co.*, 22 Oreg. 3, 28 Pac. Rep. 881, 21 Ins. L. J. 352, rehearing denied, 22 Oreg. 13, 29 Pac. Rep. 3. See Rules 12, 48, and this volume, title "Agents."

Also Vol. 1, *Fire Insurance as a Valid Contract*, "Fraud or False Swearing," Rule 23.

RULE 7.

Usage and Custom as Affecting Authority of Agent.

In an action upon an alleged oral contract of insurance, evidence of a general custom and usage authorizing a soliciting agent to bind the company, until notice of refusal to accept the risk is received by the agent and communicated to the applicant, is admissible.

Brown v. Franklin Mutual Ins. Co., 165 Mass. 565, 43 N. E. Rep. 512, 25 Ins. L. J. 630. And see *Fish v. Cottenet*, 44 N. Y. 538. See Rule 37.

RULE 8.

Contract Cannot be Established by Admissions of Agent Subsequently Made.

It is not competent to prove a contract of insurance by the declarations or admissions of an agent subsequently made. Such declarations or admissions are no part of the *res gestæ*, but are mere declarations or admissions of a past transaction and are never competent to prove the fact of a contract by the principal of the agent making them. On cross-examination the agent may be questioned as to his making such declarations, giving time and place, etc., and, upon his denial, it may be proper to contradict him; the evidence might then be admissible, not to show a contract, but as affecting his credibility as a witness;¹ if the evidence is incompetent it is not made competent by contradiction.²

1. *Commercial Ins. Co. v. Morris*, 105 Ala. 498, 18 So. Rep. 34; *Idaho Forwarding Co. v. Firemen's Fund Ins. Co.*, 8 Utah, 41, 29 Pac. Rep. 826; *King v. Phoenix Ins. Co.*, 101 Mo. App. 163, 76 S. W. Rep. 55. But see and compare *Sussex*

County Ins. Co. v. Woodruff, 2 Dutch. 541 (N. J.), where it was held that a declaration or admission by an officer of the company, the secretary, that he had sent the policy by mail to the insured was evidence as to execution and delivery of the policy.

2. *King v. Phoenix Ins. Co.*, 101 Mo. App. 163, 76 S. W. Rep. 55. And see this volume, title "Agents," Rules, 30, 31.

RULE 9.

Authority of a Soliciting Agent.

An agent with authority only to solicit, receive, and forward or submit applications for insurance to the company for its action, and without authority to make contracts of insurance, cannot bind the company by a parol contract of insurance;¹ specially when the person dealing with such agent knows or has notice that the application for insurance must be submitted to and acted upon by someone else.² But such an agent or special agent may be clothed with apparent authority to bind the company by a parol contract, and a mere reservation of a right of approval does not operate as a limitation upon such authority,³ and the insurance company may be bound if the insured has no knowledge of any limitation upon his power.⁴ And so, unless restriction upon his authority is brought to the notice or knowledge of the insured, a statute defining the status of such an agent, may establish his authority to make a valid parol contract of insurance.⁵

1. *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577, 10 Ins. L. J. 834; *Fleming v. Hartford Ins. Co.*, 42 Wis. 616; *More v. New York Bowery Ins. Co.*, 130 N. Y. 537, 21 Ins. L. J. 228; *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340, 32 N. W. Rep. 371; *Walker v. Farmers' Ins. Co.*, 51 Iowa, 679; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516. And see *Summers v. Commercial Union Ins. Co.*, 6 Duval, 19 (Can.); *Faughner v.*

Manufacturers' Ins. Co., 86 Mich. 536, 49 N. W. Rep. 643, 21 Ins. L. J. 154.

2. *Fleming v. Hartford Ins. Co.*, 42 Wis. 616; *More v. New York Bowery Ins. Co.*, 130 N. Y. 537, 21 Ins. L. J. 228.

3. *Palm v. Medina Ins. Co.*, 20 Ohio 529; *Harron v. London Ins. Co.*, 88 Cal. 16, 25 Pac. Rep. 982, 20 Ins. L. J. 713. And see *Chase v. Hamilton Ins. Co.*, 22 Barb. 527; rev'd on another point, 20 N. Y. 52; *Collins v. Phoenix Ins. Co.*, 14 Hun, 534 (N. Y.). And see this volume, title "Agents."

4. *More v. New York Bowery Ins. Co.*, *supra*; *Arff v. Star Ins. Co.*, 125 N. Y. 57, 64. And see this volume, title "Agents."

5. *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322, 58 N. W. Rep. 379, 23 Ins. L. J. 547.

RULE 10.

Agent May Have Authority to Bind the Company.

An agent may have limited authority to bind the company pending the receipt, consideration, and acceptance or rejection of the risk or application.

Fish v. Cottenet, 44 N. Y. 538; *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (N. Y.); *Brown v. Franklin Ins. Co.*, 165 Mass. 565, 43 N. E. Rep. 512, 25 Ins. L. J. 630. And see *Collins v. Phoenix Ins. Co.*, 14 Hun, 534 (N. Y.); *Otterbein v. Iowa State Ins. Co.*, 57 Iowa, 274; *Rowland v. Springfield Ins. Co.*, 18 Ill. App. 601.

RULE 11.

Liability of Agent to Repay Premium.

As between the agent and the insured, the former is liable to repay the premium received on an oral contract to deliver a policy, which is never done, notwithstanding the latter might have possibly recovered on the oral contract had there been a fire.

Collier v. Bedell, 39 Hun, 238.

RULE 12.

When Risk Deemed to Commence.

If there are no circumstances indicating the intention of the parties and no time is specified in the contract, the risk is deemed to have commenced at the date of the contract; if before the contract of insurance is made the property has ceased to exist, although unknown to the parties, the risk never attaches;¹ unless the contract by its terms covers property "lost or not lost."²

1. *Union Ins. Co. v. American Ins. Co.*, 107 Cal. 327, 40 Pac. Rep. 431, 24 Ins. L. J. 785, 28 L. R. A. 692. And see *City of Davenport v. Peoria Ins. Co.*, 17 Iowa, 276; *Lightbody v. North American Ins. Co.*, 23 Wend. 18 (N. Y.); *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421. See Rules 6, 48.

2. *Marx v. National Ins. Co.*, 25 La. Ann. 39. And see *Security Ins. Co. v. Kentucky Ins. Co.*, 7 Bush, 81 (Ky.).

RULE 13.

Amount Must be Fixed After Refusal to Renew.

A policy having expired and the company having declined to renew for same amount, an alleged oral contract to continue or renew the insurance a month later is not valid unless the amount is fixed and determined upon.

Sater v. Henry County Farmers' Ins. Co., 92 Iowa, 579, 61 N. W. Rep. 209, 24 Ins. L. J. 220.

RULE 14.

Risk May be Inferred.

When all the elements of a sufficient parol contract of insurance by both a fire and marine insurance com-

pany are shown to exist, excepting the risk, it may be inferred from the situation and circumstances of the property that the insurance intended is against fire.

Baile v. St. Joseph Ins. Co., 73 Mo. 371, 10 Ins. L. J. 657.

RULE 15.

Particular Company Must be Designated to Complete Contract.

A mutual understanding with a local agent who is to "keep applicant insured," but choice of companies and details being left to him, is inoperative as a sufficient parol contract of insurance;¹ so when an agent makes a verbal contract to insure in one of the companies represented by him, the selection being left to him, the designation of the particular company is essential to complete the contract.²

1. *Sargent v. National Ins. Co.*, 86 N. Y. 626, 10 Ins. L. J. 852.

2. *Sheldon v. Hekla Ins. Co.*, 65 Wis. 436, 15 Ins. L. J. 622; *Kleis v. Niagara Ins. Co.*, 117 Mich. 469, 76 N. W. Rep. 155, 27 Ins. L. J. 912. And see *Connecticut Ins. Co. v. Bennett*, 1 Ohio Dec. 60.

RULE 16.

Contract May be Complete Though Misunderstanding as to Term.

An oral contract of insurance may be deemed complete and enforced in equity, notwithstanding the insured understood the term to be one year, and the agent of the company three years, the rate agreed being the usual one for three years, and the amount and the company being left to the agent to determine, such determination being evidenced by a memorandum made by him.

Croft v. Hanover Ins. Co., 40 W. Va. 508, 21 S. E. Rep. 854, 24 Ins. L. J. 756.

RULE 17.

As Affected by Indefiniteness as to Time and Rate of Premium.

A parol contract of insurance, indefinite as to time and rate of premium, is incapable of enforcement.

Strohn v. Hartford Ins. Co., 37 Wis. 625. And see *Christie v. North British Ins. Co.*, 3 Cas. Ct. Sess. 360 (Scotland). See Rules 16, 19.

RULE 18.

As Dependent upon Payment of the Premium.

Unless made a condition precedent, the validity of a parol contract of insurance does not depend upon the actual payment of the premium; an agreement to pay the premium is a sufficient consideration for the agreement to insure or issue a policy;¹ prepayment of the premium is waived by evidence of credit to the insured or his broker,² and if not demanded it is evidence of such waiver.³

1. *Campbell v. American Ins. Co.*, 73 Wis. 100, 40 N. W. Rep. 661. And see *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. 82 (N. Y.); *Western Massachusetts Ins. Co. v. Duffey*, 2 Kans. 347; *Bragdon v. Appleton Ins. Co.*, 42 Me. 259; *Millville Ins. Co. v. Collerd*, 9 Vroom, 480 (N. J.).

2. *Ruggles v. American Central Ins. Co.*, 114 N. Y. 415. And see *Bragdon v. Appleton Ins. Co.*, 42 Me. 259.

3. *Continental Ins. Co. v. Roller*, 101 Ill. App. 77. And see this volume, "Premium."

RULE 19.

Rate of Premium and Term May be Implied.

To sustain a completed parol contract, it is not essential that the rate of premium and the term be named or fixed in the negotiation, when there is a fixed annual rate for the class of property insured, location

and description being given, and the insured's agent knowing the rate of premium and usual term as one year. The elements as to rate and term may be implied from custom and usage known to the parties, or from their previous dealing.

Michigan Pipe Co. v. North British & Mercantile Ins. Co., 97 Mich. 493, 56 N. W. Rep. 849; *Concordia Ins. Co. v. Heffron*, 84 Ill. App. 610; *Baxter v. Massasoit Ins. Co.*, 13 Allen, 320 (Mass.). And see *Cooke v. Ætna Ins. Co.*, 7 Daly, 555 (N. Y.); *Scott v. Home Ins. Co.*, 53 Wis. 238.

RULE 20.

Sufficiency as Tested by Insured's Obligation to Pay Premium — Contract Mutual.

All the elements of the contract must be agreed upon and both parties bound — the one to insure and the other to pay the premium, before a sufficient parol contract can be established;¹ the contract of insurance is mutual, and if the assured is not indebted for the premium at time of the loss, the company is not liable.²

1. *Taylor v. State Ins. Co.*, 107 Iowa, 275, 77 N. W. Rep. 1032; *Milwaukee Mechanics' Ins. Co. v. Graham*, 80 Ill. App. 549, aff'd, 181 Ill. 158, on opinion below. And see *Home Ins. Co. v. Field*, 42 Ill. App. 392; *Insurance Co. N. A. v. Schall*, 96 Md. 225, 53 Atl. Rep. 925.

2. *Home Ins. Co. v. Field*, 42 Ill. App. 392; *Mattoon Mfg. Co. v. Oshkosh Ins. Co.*, 69 Wis. 564, 35 N. W. Rep. 12; *Anderson v. Continental Ins. Co.*, 105 N. Y. 666, memo., 12 N. E. Rep. 793, rev'g judgment in favor of plaintiff on dissenting opinion of Davis, P. J., in court below. See 21 Wkly. Digest, 35. See Rule 51.

RULE 21.

When Acceptance of Application Binds the Company — Use of Mail.

The acceptance of a written application by a company, forwarded to it by its agent, binds the company

as a complete contract of insurance, without regard to the issue and delivery of the policy;¹ but a proposition does not become a contract until its maker or his agent is notified of acceptance,² though when acceptance or policy is deposited in the mail it takes effect at that time.³

1. *Hartford Ins. Co. v. King*, 106 Ala. 519, 17 So. Rep. 707; *Goodall v. New England Ins. Co.*, 5 Fost. 169 (N. H.). And see *Gloucester v. Howard Ins. Co.*, 5 Gray, 497 (Mass.); *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. 312 (N. Y.); *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54.

2. *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291, 33 Atl. Rep. 731, 26 Ins. L. J. 120; *Hening v. American Ins. Co.*, 123 Iowa, 533, 99 N. W. Rep. 130. And see *Milville Ins. Co. v. Colterd*, 9 Vroom, 480 (N. J.). See Rule 22 *et seq.*

3. *Tayloe v. Merchants' Ins. Co.*, 9 How. 390 (U. S.); *Hallock v. Commercial Ins. Co.*, 2 Dutch. 268, *aff'd*, 3 Dutch. 645 (N. J.); *Northhampton Ins. Co. v. Tuttle*, 11 Vroom, 476 (N. J.). And see *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. 312 (N. Y.).

RULE 22.

Must be Evidence of Acceptance.

When a written application for insurance is made through an agent not authorized to make contracts of insurance, and such application provides that no liability shall attach until it is accepted at the home office of the company, there is no liability for a loss happening before such acceptance;¹ so when the application is subject to approval and acceptance by the company, there must be evidence of acceptance before loss occurs;² and when contract is subject to approval and acceptance of the insured, there must be evidence of acceptance before occurrence of loss.³

1. *St. Paul F. & M. Ins. Co. v. Kelley*, Nebr. , 89 N. W. Rep. 997; *Pickett v. German Ins. Co.*, 39 Kans. 697, 18 Pac. Rep. 903.

2. *Easley v. New Zealand Ins. Co.*, 5 Ida. 593, 51 Pac. Rep. 418, 27 Ins. L. J. 289; *Haskin v. Agricultural Ins. Co.*, 78 Va. 700; *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Lungstrass v. German Ins. Co.*, 48 Mo. 201; *Faughner v. Manufacturers' Ins. Co.*, 86 Mich. 536; *Hallock v. Commercial Ins. Co.*, 2 Dutch. 268 (N. J.); *More v. New York Bowery Ins. Co.*, 130 N. Y. 537; *Welsh v. Continental Ins. Co.*, 47 Hun, 598 (N. Y.); *Walker v. Farmers' Ins. Co.*, 51 Iowa, 679.

3. *Millville Ins. Co. v. Colterd*, 9 Vroom, 480 (N. J.); *Lancashire Ins. Co. v. Nill*, 114 Pa. St. 248. And see *Van Tassel v. Greenwich Ins. Co.*, 151 N. Y. 130, rev'g 83 Hun, 612, 72 Hun, 386.

RULE 23.

Retention of Application Insufficient — Acceptance Necessary — Evidence.

Mere retention of an application for insurance forwarded by a broker, or a soliciting agent, does not constitute a sufficient parol contract of insurance;¹ to bind the company there must be actual acceptance,² which may be inferred from the facts and course of business pursued by the company or its officers.³ While acceptance must be evidenced by some overt act, it is not necessary that such act should come to the knowledge of the proposer.⁴

1. *Faughner v. Manufacturers' Ins. Co.*, 86 Mich. 536, 49 N. W. Rep. 643, 21 Ins. L. J. 154. And see *Walker v. Farmers' Ins. Co.*, 51 Iowa, 679.

2. *More v. New York Bowery Ins. Co.*, 130 N. Y. 537, 29 N. E. Rep. 757; *Walker v. Farmers' Ins. Co.*, 51 Iowa, 679. See Rule 22.

3. *Krumm v. Jefferson Ins. Co.*, 40 Ohio St. 225.

4. *Milwaukee Mechanics' Ins. Co. v. Graham*, 80 Ill. App. 549, aff'd, 181 Ill. 158, on opinion below. And see *National Church Ins. Co. v. Trustees M. E. Church*, 105 Ill. App. 143. And see Rule 26.

RULE 24.

As Dependent upon Acceptance by the Insured.

When an application is forwarded by a soliciting agent to the company, which materially alters the application and issues a policy to conform to the alteration, and sends the policy to the agent and fire occurs previous to its delivery to the assured, the policy not having been accepted by the insured, it is not a complete contract at time of the fire;¹ but when the policy is sent to the agent, in conformity to the application, it is a complete contract as soon as made out and sent.²

1. *Stephens v. Capital Ins. Co.*, 87 Iowa, 283, 54 N. W. Rep. 139, 22 Ins. L. J. 208. And see *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 118.

2. *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. 312 (N. Y.).

RULE 25.

Rights of Parties Fixed at Time of Fire.

If an application forwarded to the company is mutually intended and agreed merely as a description of the property and that it would not impair insured's right under a parol agreement with the agent of the company, and a letter from the company is received by the agent rejecting the application before delivery of the policy, but after the fire, it does not affect insured's right to recover the insurance. Under such circumstances assured's right to the policy is vested before the fire, and the delivery of it to him by the agent after the fire is no more than a court of equity would compel the company to do.

Howard Ins. Co. v. Owens, 94 Ky. 197, 21 S. W. Rep. 1037, 22 Ins. L. J. 514.

RULE 26.

Effect of Delay in Acting upon Application.

Company is not liable for a loss on the ground that a soliciting agent failed to forward an application to the company or to return it to the insured within a reasonable time; having no authority to bind the company by contract, his delay cannot make one. If there is unreasonable delay the insured should assume the application rejected and protect himself by procuring other insurance;¹ unreasonable delay in acting upon an application is not acceptance.²

1. *Trask v. German Ins. Co.*, 53 Mo. App. 625.

2. *Brink v. Merchants & Farmers' Ins. Co.*, S. D. ,
95 N. W. Rep. 929. And see Rule 23.

RULE 27.

Effect of no Oral Agreement Prior to Delivery of Policy.

Until the delivery of the policy or payment of the premium, there is no contract of insurance, in the absence of any oral agreement for insurance prior to the policy, although the insured previously makes application and is notified by the company's agent that a policy is ready for him.

Wainer v. Milford Ins. Co., 153 Mass. 335, 26 N. E. Rep. 877, 11 L. R. A. 598; *Consumers' Match Co. v. German Ins. Co.*, 70 N. J. L. 226, 57 Atl. Rep. 440. And see *Myers v. Liverpool, L. & G. Ins. Co.*, 121 Mass. 338.

RULE 28.

Effect of Acceptance of Policy.

One who accepts a policy cannot ignore it and sue upon an alleged prior parol contract; if the policy

differs from the contract as made, the remedy is by reformation.

Kleis v. Niagara Ins. Co., 117 Mich. 469, 76 N. W. Rep. 155, 27 Ins. L. J. 912. See this volume, "Reformation."

RULE 29.

Sufficient Parol Contract Cannot be Made Conditional by Telegram.

After sufficient meeting of the minds to effect a parol contract of insurance by correspondence and telegram between the assured and the company's agent, the latter cannot, by subsequent telegram, change the contract from one of absolute insurance to one of conditional insurance.

Schultz v. Phoenix Ins. Co., 77 Fed. Rep. 375.

RULE 30.

Contract by Deposit of Letter.

If the insurance contract is claimed to be effected by deposit of a letter, same must be properly deposited, stamped, and postpaid.

Blake v. Hamburg-Bremen Ins. Co., 67 Tex. 160, 17 Ins. L. J. 436.

RULE 31.

Effect of Statute of Frauds.

Neither an agreement to issue a policy of insurance, nor an agreement to renew an existing policy or a contract of insurance, is within the statute of frauds, and such contracts or agreements need not be in writing,¹ but may be within the statute when the policy is

not to be delivered for more than two years after the contract.²

1. *Commercial Ins. Co. v. Morris*, 105 Ala. 498, 18 So. Rep. 34; *Sanborn v. Firemen's Ins. Co.*, 16 Gray, 448 (Mass.); *Security Ins. Co. v. Kentucky Ins. Co.*, 7 Bush, 81 (Ky.); *Mattingly v. Springfield F. & M. Ins. Co.*, Ky., 83 S. W. Rep. 577; *German-American Ins. Co. v. Yellow Poplar Lumber Co.*, 84 S. W. Rep. 551 (Ky.); *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252, 9 Ins. L. J. 577; *Van Loan v. Farmers' Ins. Co.*, 24 Hun, 132, aff'd, 90 N. Y. 280; *Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305.

2. *Klein v. Liverpool, L. & G. Ins. Co.*, 57 S. W. Rep. 250 (Ky.). And see Rule 1 and Georgia statute.

RULE 32.

Subject to Conditions in Policy.

An oral contract of fire insurance in legal effect adopts and makes the standard form of policy prescribed a part of it, and the insured is bound to comply with its terms;¹ a parol contract of insurance assumes or presumes the policy ordinarily employed by the company, and the contract is subject to its provisions;² though such presumption is not always conclusive, and may be affected by the oral agreement otherwise;³ but after acceptance of the policy, assured cannot abandon it, and maintain a suit on the oral agreement to avoid operation of the limitation clause;⁴ so an oral contract for additional insurance is subject to the terms and conditions of policy then on the risk.⁵

1. *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 56 N. E. Rep. 743. And see *Springer v. Anglo-Nevada Ins. Co.*, 58 Hun, 601, 33 N. Y. Supp. 543. *Contra*, *Hardwick v. State Ins. Co.*, 23 Oreg. 290, 31 Pac. Rep. 656, 22 Ins. L. J. 262.

Is subject to statutory conditions of the Ontario Insurance Act.

Dominion Grange Ins. Co. v. Bradt, 25 Can. S. C. 154.

2. *Sproul v. Western Assur. Co.*, 33 Oreg. 98, 54 Pac. Rep. 180, 28 Ins. L. J. 118; *Young v. St. Paul F. & M. Ins. Co.*, 68 S. C. 387, 47 S. E. Rep. 681; *Vining v. Franklin Ins. Co.*, 89 Mo. App. 311; *DeGrove v. Metropolitan Ins. Co.*, 61 N. Y. 594; *Eames v. Home Ins. Co.*, 4 Otto, 621 (U. S.); *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256; *Home Ins. Co. v. Favorite*, 46 Ill. 263; *Hubbard v. Hartford Ins. Co.*, 33 Iowa, 325; *Smith v. State Ins. Co.*, 64 Iowa, 716; *McCann v. Ætna Ins. Co.*, 3 Nebr. 198. And see Rule 34.

3. *Salisbury v. Hekla Ins. Co.*, 32 Minn. 458, 14 Ins. L. J. 550; *Humphry v. Hartford Ins. Co.*, 15 Blatchf. 504 (U. S. Cir.); *Nebraska Ins. Co. v. Seivers*, 27 Nebr. 541, 43 N. W. Rep. 351, 19 Ins. L. J. 902.

4. *Farmers' Ins. Co. v. Barr*, 94 Pa. St. 345. And see *Kleis v. Niagara Ins. Co.*, 117 Mich. 469, 76 N. W. Rep. 155, 27 Ins. L. J. 912.

5. *Green v. Liverpool, L. & G. Ins. Co.*, 91 Iowa, 615, 60 N. W. Rep. 189, 24 Ins. L. J. 180. And see *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray, 204 (Mass.).

RULE 33.

Conditions Requiring Indorsement of Written Consent — What Conditions Operative.

In case of an oral contract of insurance, or when the company has refused to issue its policy thereon, conditions requiring written consent to be indorsed, as, for instance; if there is other insurance, are inoperative, and mere notice of same to the company or its agent is sufficient;¹ but conditions precedent to loss becoming due and payable in event of fire are operative,² so the condition prescribing time in which suit must be brought,³ unless waived.⁴

1. *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371, 10 Ins. L. J. 657; *Dayton Ins. Co. v. Kelley*, 24 Ohio St. 345; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256. And see *Cockburn v. British-America Assur. Co.*, 19 Ont. 245 (Can.); *Parsons v. Queen Ins. Co.*, 43 Up. Can. Q. B. 271.

See also Vol. 1, *Fire Insurance as a Valid Contract*, "Waiver," Rule 16.

2. *Hicks v. British America Ins. Co.*, 162 N. Y. 284, 56 N. E. Rep. 743; *McCann v. Ætna Ins. Co.*, 3 Nebr. 198; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, 41 N. W. Rep. 373.

Proofs need not be served in limited time.

Nebraska Ins. Co. v. Seivers, 27 Nebr. 541, 43 N. W. Rep. 351, 19 Ins. L. J. 902.

See Vol. 1, *Fire Insurance as a Valid Contract*, "Statement or Proof of Loss," Rule 10. And see Rule 32.

3. *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594. But see *Penley v. Beacon Ins. Co.*, 7 Grant Ch. 130 (Can.).

4. *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371; *Hicks v. British America Ins. Co.*, 162 N. Y. 284, 56 N. E. Rep. 743.

In *Baile v. St. Joseph Ins. Co.*, the court held that refusing to issue the policy and denial of liability waived proofs, and to same effect is *Weeks v. Lycoming Ins. Co.*, 7 Ins. L. J. 552 (U. S. Cir.). *Caldwell v. Stadacona Ins. Co.*, 11 Duval, 212 (Can.); *Campbell v. American Ins. Co.*, 73 Wis. 100, 40 N. W. Rep. 661; *Gold v. Sun Ins. Co.*, 73 Cal. 216. And see *Taylor v. Merchants' Ins. Co.*, 9 How. 390 (U. S.).

In *Hicks v. British America Ins. Co.* the court held that a *local agent* who was alleged to have made the oral contract had no *authority as such* to make such waiver either by refusal to issue the policy, or by denial of the contract.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Statement or Proof of Loss" and "Waiver;" also this volume, title "Agents."

The courts agree on the proposition that proofs of loss may be waived by refusal to issue policy and denial of liability, but differ as to the authority of the agent.

See *Hicks v. British America Ins. Co.*, *supra*.

RULE 34.

Binder Subject to Conditions in Policy — Termination under Special Provision — Cancellation.

A binding slip is subject to the terms and conditions of the policy in ordinary use by the company;¹ and if that in terms provides that the insurance may be determined at any time on giving notice to the assured, or to the person who may have procured it, a notice to the broker who procured the insurance may be good

notice, and the insurance terminates *eo instanti* on such notice.² Otherwise it may be canceled on five days' notice.³

1. *Lipman v. Niagara Ins. Co.*, 121 N. Y. 454, 24 N. E. Rep. 699, 19 Ins. L. J. 985, 8 L. R. A. 719, *aff'g* 48 Hun, 503; *Karelsen v. Sun Fire Office*, 122 N. Y. 545, 25 N. E. Rep. 921, 20 Ins. L. J. 44; *Belt v. American Central Ins. Co.*, 29 App. Div. 546, *aff'd*, 163 N. Y. 555, without opinion; *Concordia Ins. Co. v. Heffron*, 84 Ill. App. 610.

2. *Lipman v. Niagara Ins. Co.*, *supra*; *Karelsen v. Sun Fire Office*, *supra*. And see *King v. Hekla Ins. Co.*, 58 Wis. 508.

3. *Colonial Assur. Co. v. National Ins. Co.*, 110 Ill. App. 471. And see this volume, "Cancellation."

RULE 35.

Binder Does not Contain Whole Contract.

A certificate of insurance is not sufficient to sustain a claim and recovery when it shows on its face that it does not contain the whole agreement;¹ a binding receipt does not constitute the contract.²

1. *Underwriters' Agency v. Sutherlin*, 46 Ga. 652.

2. *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594. And see Rule 36, *et seq.*

RULE 36.

Effect of Binder as Renewal — When Issued for New Insurance — Time Limitation.

When the insured applies for a renewal of an existing policy and pays the premium, receiving a binding receipt, admitting payment and stating that receipt is binding for thirty days, and to be invalid on issue of renewal, the company is bound as though policy actually issued, though it declined to renew, but fails to notify the assured and return the premium;¹ a binder does not effect a renewal when it does not,

upon its face, purport to be a renewal;² when the binder is issued for entirely new insurance and is limited in express terms to thirty days, pending consideration of the application by the company, the insurance ceases on expiration of the thirty days, without regard to any notice of rejection by the company.³

1. Phoenix Ins. Co. *v.* Hale, 67 Ark. 433, 55 S. W. Rep. 486.

2. Underwood *v.* Greenwich Ins. Co., 161 N. Y. 413, 55 N. E. Rep. 936.

3. Barr *v.* Insurance Co. N. A., 61 Ind. 488.

RULE 37.

Binder Subject to Usage and Custom — Cancellation — Question of Fact.

A binding slip not containing all the terms of the insurance contract is subject to parol evidence of usage and custom between insurance brokers and insurance companies and also of actual intention and design of the parties as bearing upon the temporary character of the instrument pending consideration of the application and termination of same on rejection and notice to the insured;¹ if, as matter of fact, the binder is a mere temporary arrangement, the five days' notice of cancellation required by the standard form of policy is inoperative,² and the question is one of fact which should be submitted to and determined by a jury.³

1. Underwood *v.* Greenwich Ins. Co., 161 N. Y. 413, 55 N. E. Rep. 936, rev'g 28 App. Div. 163. And see previous appeal, *sub nom.* Van Tassel *v.* Greenwich Ins. Co., 151 N. Y. 130, rev'g 83 Hun, 612, and 72 Hun, 386; Thompson *v.* Adams, L. R. 23 Q. B. Div. 361.

2. *Underwood v. Greenwich Ins. Co.*, 54 App. Div. 386, 66 N. Y. Supp. 651.

3. *Underwood v. Greenwich Ins. Co.*, 66 App. Div. 531, 73 N. Y. Supp. 251.

RULE 38.

Presumption as to Division of Risk on Binder — When Particular Company Must be Designated.

When the binder by an agent is for certain amount in several named companies, the legal presumption is that the risk is to be equally divided among them and each is severally bound in equal proportionate amounts;¹ the agent representing several companies, the particular company must be designated.²

1. *Fitton v. Phoenix Assur. Co.*, 25 Fed. Rep. 880.

2. *Hartford Ins. Co. v. Trimble*, Ky., 78 S. W. Rep. 462. And see Rule 15.

RULE 39.

Binder as Dependent upon Rate of Premium.

A binding slip is legally operative as a temporary contract of insurance, though the exact rate of premium may not be agreed upon at time of its issue and delivery; the insured is bound to pay a reasonable rate.

J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co., 68 N. J. L. 674, 54 Atl. Rep. 458.

See Rules 17, 19, *et seq.*

RULE 40.

Delivery of Policy not Essential.

When policy has been actually issued by the company or its agent, and is simply retained by the agent for his individual protection until reimbursed by the assured for the premium which the agent has paid or

for which he has become responsible, the manual delivery of the policy to the assured is not essential.

Firemen's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. Rep. 779.

RULE 41.

As Affected by Delivery of Policy.

Whether or not a policy is delivered depends not upon its manual possession by the assured after its issuance, but rather upon the intention of the parties as manifested by their acts or agreements; whatever the parties have agreed to as a delivery, or whatever their conduct shows to have been considered as a delivery by them controls. Where the evidence tends to show that the policy was completed in writing, and the assured was notified by the agent that this has been done, and that the policy was in his possession for the assured, it may be sufficient evidence to establish a delivery;¹ so when the assured leaves the policy in the hands of the company's agent subject to the order and control of a third person, it is sufficient delivery though such third party has not called for it or received it.² A test is not who has actual possession, but who has the right to possession; an agent made custodian by request or acquiescence is sufficient.³

1. *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 So. Rep. 903. And see *Morrison v. Insurance Co. N. A.*, 64 N. H. 137, 16 Ins. L. J. 966; *Wheeler v. Watertown Ins. Co.*, 131 Mass. 1; *Bragdon v. Appleton Ins. Co.*, 42 Me. 259; *Phoenix Ins. Co. v. Meier*, 28 Nebr. 124, 44 N. W. Rep. 97; *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 37 N. W. Rep. 704.

2. *Home Ins. Co. v. Curtis*, 32 Mich. 402.

3. *Young v. St. Paul F. & M. Ins. Co.*, 68 S. C. 387, 47 S. E. Rep. 681.

RULE 42.

Admissibility of Parol Evidence to Establish Condition Precedent to Contract Taking Effect.

Parol evidence is admissible to show that a written policy which is in form a complete contract was not to and did not become a binding contract until the performance or occurrence of some condition precedent resting in parol. When company's agent retains possession of the completed policy, or it is placed in hands of a third party, until it can be ascertained whether the company would assent to and carry the risk there is no delivery of the policy, and there is no completed contract of insurance between the parties. The company acquires no right to the money of the assured for the policy, when it is to be operative upon a condition that does not occur, namely, that the defendant would accept the risk. The failure of the agent to notify the assured, or his broker, of the insurance company's refusal to carry the risk does not place it under any contract obligation to the assured;¹ so company may retain policy and make its delivery optional with insured by payment of the premium within a certain time,² but such option or condition must be complied with before a fire,³ unless there is a waiver by an authorized agent.⁴

1. *Nutting v. Minnesota Ins. Co.*, 98 Wis. 26, 73 N. W. Rep. 432; *Brown v. American Central Ins. Co.*, 70 Iowa, 390.

2. *Home Ins. Co. v. Field*, 42 Ill. App. 392.

3. *Home Ins. Co. v. Field*, *supra*.

4. *Home Ins. Co. v. Field*, *supra*, subsequent appeal, 53 Ill. App. 119.

RULE 43.

Renewal Without Request of Insured — Agent Directed not to Deliver.

When the property is destroyed by fire while a policy thereon, issued voluntarily without application in anticipation of a desire of a renewal of an expired policy, is in course of transmission by mail to an agent, who receives it the day after the fire, and is directed not to deliver it, there is no valid contract of insurance.

New York Lumber Co. *v.* People's Fire Ins. Co., 96 Mich. 20, 55 N. W. Rep. 434, 22 Ins. L. J. 632.

RULE 44.

Delivery to Broker upon Condition — Contract as Dependent upon Condition Precedent.

The policy may be delivered to the assured's broker upon a condition, for instance, subject to a survey or inspection, and it ceases to be binding upon notice to the broker of rejection, though the policy may be accidentally or inadvertently sent to the assured;¹ so if anything remains to be done by the insured as a condition precedent, the contract of insurance is not complete, and no recovery can be had thereon.²

1. Hartford Ins. Co. *v.* Wilson, 187 U. S. 467, 23 Sup. Ct. Rep. 189, rev'g 17 App. D. C. 14.

2. Mattoon Mfg. Co. *v.* Oshkosh Ins. Co., 69 Wis. 564, 35 N. W. Rep. 12.

RULE 45.

Contract Conditioned on Termination or Cancellation of Other Insurance.

A contract of insurance may be conditioned on termination or cancellation of other insurance which

it is intended to replace as a substitute;¹ but this must be with knowledge or authority of the insured.²

1. *Massasoit Steam Mills v. Western Assur. Co.*, 125 Mass. 110. And see *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 37 N. W. Rep. 704. And see this volume, "Cancellation."

2. *Lancashire Ins. Co. v. Nill*, 114 Pa. St. 248; *Dibble v. Northern Assur. Co.*, *supra*.

RULE 46.

Mistake May be Corrected in Equity.

A mistake of the company's agent in entering a memorandum of an oral or parol agreement of insurance may be corrected in suit in equity on the executory oral agreement;¹ or for reformation of the policy if issued and delivered.² But the fact that there is no entry of the risk on company's books is not evidence in its favor that an oral contract was not made.³

1. *Croft v. Hanover Ins. Co.*, 40 W. Va. 508, 21 S. E. Rep. 854, 24 Ins. L. J. 756.

2. *Kleis v. Niagara Ins. Co.*, 117 Mich. 469, 76 N. W. Rep. 155, 27 Ins. L. J. 912; *Liverpool, L. & G. Ins. Co. v. Wyld*, 1 Duval, 604 (Can.).

And see this volume, "Reformation."

3. *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448 (Mass.).

RULE 47.

As Affected by Negotiation on Sunday.

A contract of insurance by a policy dated, executed, and delivered on a week day cannot be defeated because the terms were talked over, or even agreed to, upon a Sunday.

Wooliver v. Boylston Ins. Co., 104 Mich. 132, 62 N. W. Rep. 149, 24 Ins. L. J. 793.

RULE 48.

Parol Contract as Affecting Right to Obtain Policy After Fire.

If there is a sufficient parol contract of insurance at time of the fire, such contract remains binding notwithstanding the insured goes to the company, pays the premium, and receives the policy, without first notifying the company of the fire;¹ so when the agent holds policy for the insured he is bound to deliver it after a fire.²

1. *Keim v. Home Ins. Co.*, 42 Mo. 38; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151. And see *Whitaker v. Farmers' Union Ins. Co.*, 29 Barb. 312 (N. Y.). See Rules 6, 12.

And see this volume, title "Agents," Rule 18; and Vol. 1, *Fire Insurance as a Valid Contract*, "Fraud or False Swearing," Rule 23.

2. *Young v. St. Paul F. & M. Ins. Co.*, 68 S. C. 387, 47 S. E. Rep. 681.

RULE 49.

Repudiation of Contract After a Loss Ineffective.

Where the making of the contract is in dispute, the insurance company cannot be relieved from liability by proving that it repudiated liability after a loss.

Germania Ins. Co. v. Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. Rep. 41.

RULE 50.

Measure of Damage.

The measure of damages for a breach of agreement to insure property which is burned is its value or amount of the loss, not exceeding the sum which the policy was to insure.

Campbell v. American Ins. Co., 73 Wis. 100, 40 N. W. Rep. 661; *Lion Ins. Co. v. Starr*, 71 Tex. 733, 12 S. W. Rep. 45; *Rockwell v. Hartford Ins. Co.*, 4 Abb. Pr. 179 (N. Y.).

RULE 51.

Burden of Proof — Test in Mutuality and Obligation to Pay Premium.

The burden of proof is on the insured, who alleges the existence of a parol contract, to show by satisfactory evidence that the negotiations were concluded and contract in fact made, by which the parties became mutually bound; an infallible test is to determine whether both parties are bound; unless the assured is obligated to pay the premium, on a tender of the policy, the company is not to deliver it or to pay the loss, if one occurs. When the insured is not bound to pay the premium, the company cannot be bound to pay the loss.

J. R. Davis Lumber Co. v. Scottish Union & N. Ins. Co., 94 Wis. 472, 69 N. W. Rep. 156. And see *Waldron v. Home Mutual Ins. Co.*, 9 Wash. 534, 38 Pac. Rep. 136.

And see Rule 20.

RULE 52.

Weight of Evidence — Question of Fact.

Plaintiff, in an action against an insurance company upon an oral contract of insurance, is not required to establish such contract by clear and conclusive proof; so far as weight of testimony is concerned, there is no distinction between such a case and any case where the burden of proof rests upon the plaintiff, and its sufficiency or weight is to be determined by a jury;¹ a preponderance of the evidence is sufficient.²

1. *Waldron v. Home Mut. Ins. Co.*, 16 Wash. 193, 47 Pac. Rep. 425. And see Rules 4, 58.

2. *Farmers' Society v. German Ins. Co.*, 97 Iowa, 749, 66 N. W. Rep. 878; *Abel v. Phoenix Ins. Co.*, 57 App. Div. 629, 68 N. Y. Supp. 19, prior appeal, 47 App. Div. 81; *Denning v. Phoenix Ins. Co.*, 68 Ill. 414; *Continental Ins. Co. v. Jenkins*, 5 Ins. L. J. 514 (Ky.); *McCabe v. Aetna Ins. Co.*, 9 N. D. 19, 81 N. W. Rep. 426.

RULE 53.

Strictness of Proof as Affected by Renewal.

In controversies arising out of parol contracts to renew existing insurance, less strictness of proof may be required than when it is sought to establish an entirely new and distinct oral contract.

Continental Ins. Co. v. Jenkins, Ky., 5 Ins. L. J. 514. And see Rules 4, 36. See and compare *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365.

RULE 54.

Remedy for Breach of Parol Contract — Effect of Company's Refusal to Issue Policy.

The remedy for the breach of a parol contract of insurance may be either in equity for specific performance, or at law upon the agreement;¹ when an action is based upon an alleged oral contract for a policy on the usual terms, which the company refused to issue, such refusal is the breach of such contract, and hence, having failed to issue the policy, the company can claim no exemption from liability on account of any provisions the policy might or would have contained had it been issued.²

1. *Sproul v. Western Assur. Co.*, 33 Oreg. 98, 54 Pac. Rep. 180, 28 Ins. L. J. 118; *Hardwick v. State Ins. Co.*, 20 Oreg. 547, 26 Pac. Rep. 840; *Gold v. Sun Ins. Co.*, 73 Cal. 216, 14 Pac. Rep. 786; *Commercial Ins. Co. v. Morris*, 105 Ala. 498, 18 So. Rep. 34; *Home Ins. Co. v. Adler*, 77 Ala. 242; *Insurance Co. N. A. v. Bird*, 175 Ill. 42, 51 N. E. Rep. 686; *Carpenter v.*

Mutual Ins. Co., 4 Sandf. Ch. 408 (N. Y.); *Humphrey v. Hartford Ins. Co.*, 15 Blatchf. 35, 504 (U. S. Cir.); *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362 (Va.).

2. *Hardwick v. State Ins. Co.*, 23 Oreg. 290, 31 Pac. Rep. 656, 22 Ins. L. J. 262; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. Rep. 883; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371, 10 Ins. L. J. 657; *Campbell v. American Ins. Co.*, 73 Wis. 100, 40 N. W. Rep. 661; *Nebraska Ins. Co. v. Seivers*, 27 Nebr. 541, 43 N. W. Rep. 351; *Clarkson v. Western Assur. Co.*, 92 Hun, 527, 37 N. Y. Supp. 53. *Contra*, *Hicks v. British America Ins. Co.*, 162 N. Y. 284, 56 N. E. Rep. 743. And see *McCann v. Ætna Ins. Co.*, 3 Nebr. 198; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, 41 N. W. Rep. 373.

And see Rules 4, 32, 55.

The distinction between the remedy in equity, for specific performance, and at law, for breach of the oral agreement, would seem to no longer exist, at least in those States which have a Code of Practice, like New York, and where there is a standard form of insurance contract prescribed.

See *Hicks v. British America Ins. Co.*, *supra*.

This subject is governed by local rules and practice, to which reference should be had.

RULE 55.

Pleading.

When the assured depends upon and pleads an oral contract of insurance, it is not necessary for him to plead the conditions in the policy and allege performance; if defendant relies for defense on nonperformance of any of the conditions in the policy to be issued, such conditions should be pleaded as part of the contract as well as nonperformance;¹ the insured may state his cause of action upon both the oral contract and the policy in separate statements or counts, without being required to elect as between them.²

1. *Duff v. Fire Assoc.*, 129 Mo. 460, 30 S. W. Rep. 1034, rev'g 56 Mo. App. 355. And see *Ganser v. Firemen's Fund Ins. Co.*, 34 Minn. 372; *Merchants' Ins. Co. v. Arnold*, 32 S. W. Rep. 579.

See and compare various rules under this title and Vol. 1, Fire Insurance as a Valid Contract, "Waiver," Rules 60, 61.

2. *Velie v. Newark Ins. Co.*, 65 How. Pr. 1, 12 Abb. N. C. 309 (N. Y.).

RULE 56.

Retention of Jurisdiction by a Court of Equity.

If suit be brought in equity for specific performance of the oral contract, to avoid circuitry the court will retain jurisdiction and adjudge damages as on an executed contract.

Security Ins. Co. v. Kentucky Ins. Co., 7 Bush, 81 (Ky.); *Tayloe v. Merchants' Ins. Co.*, 9 How. 390 (U. S.); *Gerrish v. Insurance Co.*, 55 N. H. 355; *Franklin Ins. Co. v. Taylor*, 52 Miss. 441; *Baile v. St. Joseph Ins. Co.*, 73 Mo. 371; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. Rep. 109.

RULE 57.

Evidence in Equity.

If suit is in equity to compel the issue and delivery of the policy upon a parol contract, the proof of such contract should be clear, satisfactory, and conclusive; if there is any doubt, the suit should be dismissed.

McCann v. Aetna Ins. Co., 3 Nebr. 198. And see *Franklin Ins. Co. v. Taylor*, 52 Miss. 441, 5 Ins. L. J. 671; *Weeks v. Lycoming Ins. Co.*, 7 Ins. L. J. 552 (U. S. Cir.).

RULE 58.

Question of Fact.

Whether or not there is complete oral contract of insurance is a question proper to be submitted to and determined by a jury.

Michigan Pipe Co. v. Michigan Ins. Co., 92 Mich. 482, 52 N. W. Rep. 1070; *Baker v. Commercial Union Assur. Co.*, 162

Mass. 358, 38 N. E. Rep. 1124, 24 Ins. L. J. 512; Insurance Co. N. A. *v.* Bird, 175 Ill. 42, 51 N. E. Rep. 686; Duff *v.* Fire Assoc., 129 Mo. 460, 30 S. W. Rep. 1034; Commercial Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. Rep. 34; Waldron *v.* Home Ins. Co., 16 Wash. 193, 47 Pac. Rep. 425; Sanborn *v.* Fireman's Ins. Co., 16 Gray, 448 (Mass.); Baxter *v.* Massasoit Ins. Co., 13 Allen, 320 (Mass.); Putnam *v.* Home Ins. Co., 123 Mass. 324; Audubon *v.* Excelsior Ins. Co., 27 N. Y. 216; Rockwell *v.* Hartford Ins. Co., 4 Abb. Pr. 179 (N. Y.).

RULE 59.

Verdict of Jury not Disturbed on Appeal.

When the evidence tends to show that the agent of the company, when a policy was about to expire, orally agreed with the insured to hold the policy in force as a valid contract of insurance on the terms stated in it for an additional time, for the purpose of enabling the insured to ascertain in what terms it was wished to take a new policy in writing, and until one of the parties should terminate the temporary arrangement, or until the arrangement should end by the expiration of the reasonable time which was agreed to be allowed for that purpose, and while the policy is so held, property is burned, the question as to the existence of a sufficient oral contract of insurance is for the jury, and their verdict in favor of the insured will not be disturbed on appeal.

Baker *v.* Commercial Union Assur. Co., 162 Mass. 358, 38 N. E. Rep. 1124, 24 Ins. L. J. 512.

TITLE VIII.**Reformation.**

- RULE**
1. Reformation cannot make a new contract.
 2. Reformation and recovery may be had in same suit.
 3. Mutual mistake or mistake and fraud.
 4. Mistake must be mutual — Burden of proof — Evidence.
 5. No reformation upon proof of claimant's mistake alone.
 6. Fraud as ground for reformation — Duty in preparation of written contract.
 7. Fraud must be specifically alleged.
 8. When insured bound by acceptance of policy — His duty to examine policy.
 9. Effect of insured's failing to read policy.
 10. Mutual mistake as to effect of language — As to the law.
 11. Reformation as to interest or parties — Evidence.
 12. Effect of changes in a policy requested as a renewal — Right of assignee to reformation.
 13. When not necessary to have policy reformed.
 14. Right to reformation as affected by misrepresentation.
 15. Right to reformation as affected by remedy at law.
 16. Suit to reform not sustainable after failure in action at law.
 17. Reformation does not require new proof of loss.
 18. Correction of mistake by agent after loss.

RULE I.**Reformation Cannot Make a New Contract.**

The court cannot by reformation make a contract which was not in fact made.

Mead v. Westchester Ins. Co., 64 N. Y. 453; *Cary Mfg. Co. v. Merchants' Ins. Co.*, 42 App. Div. 201, 59 N. Y. Supp. 7; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 19 Ins. L. J. 481; *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. Rep. 720; *Farmville Ins. Co. v. Butler*, 55 Md. 233; *Boyce v. Hamburg-Bremen Ins. Co.*, 24 Pa. Super. Ct. 589.

And see Rule 4.

RULE 2.

Reformation and Recovery May be Had in Same Suit.

Reformation of the policy and recovery of the claim thereunder as reformed may be had in the same suit or action.

German Ins. Co. v. Davis, 6 Kans. App. 268, 51 Pac. Rep. 60, 27 Ins. L. J. 315; *Maryland Home Ins. Co. v. Kimmell*, 89 Md. 437, 43 Atl. Rep. 764, 28 Ins. L. J. 729; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 292; *Hammel v. Queen Ins. Co.*, 50 Wis. 240.

(This subject is also governed by local rules or codes of practice, to which reference should be had.)

RULE 3.

Mutual Mistake or Mistake and Fraud.

The mistake which will warrant a court of equity to reform a contract in writing must be one made by both parties to the agreement, so that the intentions of neither are expressed in it, or it must be the mistake of one party by which his intentions have failed of correct expression, and there must be fraud by the other party in taking advantage of the mistake and obtaining a contract with the knowledge that the one dealing with him is in error in regard to what are its terms.

Bryce v. Lorillard Ins. Co., 55 N. Y. 240; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Hay v. Star Ins. Co.*, 77 N. Y. 235; *Cary Mfg. Co. v. Merchants' Ins. Co.*, 42 App. Div. 201, 59 N. Y. Supp. 7; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. Rep. 720; *Farmville Ins. Co. v. Butler*, 55 Md. 233.

RULE 4.

Mistake Must be Mutual — Burden of Proof — Evidence.

To justify a reformation of the policy the mistake must have been mutual,¹ and may be established by parol evidence;² it must appear what the actual agreement between the parties was and that same is not in the written contract;³ the burden of proof rests upon the complainant, and the evidence must be clear, satisfactory, exact, and convincing;⁴ free from reasonable doubt;⁵ mutual mistake is not established when the assured's testimony is denied or contradicted by that of defendant's agent;⁶ a mere preponderance of evidence is not sufficient.⁷

1. *Dougherty v. Greenwich Ins. Co.*, N. J., 33 Atl. Rep. 295; *Underwriters' Fire Assoc. v. Henry*, Tex. Civ. App., 79 S. W. Rep. 1072; *Hartford Ins. Co. v. McCarthy*, Kans., 77 Pac. Rep. 90; *Milwaukee Mechanics' Ins. Co. v. Palatine Ins. Co.*, 128 Cal. 71; *Warner-Moore Co. v. Western Assur. Co.*, Va., 49 S. E. Rep. 499; *Home Ins. Co. v. Wood*, 50 Nebr. 381, 69 N. W. Rep. 941, 26 Ins. L. J. 686; *Trustees St. Clara Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. Rep. 1140; *Durham v. Insurance Co.*, 22 Fed. Rep. 468, 14 Ins. L. J. 285; *Home Ins. Co. v. Myer*, 93 Ill. 271; *German Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. Rep. 112, 19 Ins. L. J. 228; *Cary Mfg. Co. v. Merchants' Ins. Co.*, 42 App. Div. 201, 59 N. Y. Supp. 7; *Dougherty v. Lion Ins. Co.*, 41 Misc. 285, 84 N. Y. Supp. 10, aff'd, on opinion below, 95 App. Div. 618. And see *Phoenix Ins. Co. v. Gurnee*, 1 Paige, 278 (N. Y.); *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. Rep. 720; *Farmville Ins. Co. v. Butler*, 55 Md. 233.

2. *Eilenberger v. Protective Ins. Co.*, 89 Pa. St. 464; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.

3. *Slobodisky v. Phoenix Ins. Co.*, 52 Nebr. 395, 72 N. W. Rep. 483, 27 Ins. L. J. 53; *Home Ins. Co. v. Gurney*, 56 Nebr. 306, 76 N. W. Rep. 553; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 19 Ins. L. J. 481; *Dalton v. Milwaukee Mechanics' Ins. Co.*, Iowa, 102 N. W. Rep. 120; *Phoenix Ins. Co.*

v. Rogers, 11 Ind. App. 72, 38 N. E. Rep. 865; *Le Gendre v. Scottish Union & Nat. Ins. Co.*, 95 App. Div. 562, 88 N. Y. Supp. 1012; *Mitchell v. Capital City Ins. Co.*, 110 Ala. 583, 17 So. Rep. 678; *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Harrison v. Hartford Ins. Co.*, 30 Fed. Rep. 862, 16 Ins. L. J. 787; *Clem v. German Ins. Co.*, 29 Mo. App. 666; *Knox v. Lycoming Ins. Co.*, 50 Wis. 671. And see preceding cases under 1.

4. *Mitchell v. Capital Ins. Co.*, 110 Ala. 583, 17 So. Rep. 678; *Johnson v. Farmers' Ins. Co.*, Iowa, , 102 N. W. Rep. 502; *German-Amer. Ins. Co. v. Davis*, 131 Mass. 316; *Milwaukee Mechanics' Ins. Co. v. Palatine Ins. Co.*, 128 Cal. 71; *Farnell v. Home Ins. Co.*, 136 Fed. Rep. 93, C. C. A. ; *Westchester Ins. Co. v. Wagner*, 38 S. W. Rep. 214 (Tex. Civ. App.); *Slobodisky v. Phoenix Ins. Co.*, 52 Nebr. 395, 72 N. W. Rep. 483, 27 Ins. L. J. 53; *Meade v. Westchester Ins. Co.*, 64 N. Y. 453; *Miaghan v. Hartford Ins. Co.*, 12 Hun, 321; *German-Amer. Ins. Co. v. Davis*, 131 Mass. 316; *Bishop v. Clay Ins. Co.*, 49 Conn. 167; *Blake Opera House Co. v. Home Ins. Co.*, 73 Wis. 667, 18 Ins. L. J. 373; *Suydam v. Columbus Ins. Co.*, 18 Ohio, 459; *National Ins. Co. v. Crane*, 16 Md. 260; *Farmville Ins. Co. v. Butler*, 55 Md. 233; *Tesson v. Atlantic Ins. Co.*, 40 Mo. 33; *Epstein v. State Ins. Co.*, 21 Oreg. 179; *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645; *Cooper v. Farmers' Ins. Co.*, 50 Pa. St. 299.

5. *Steinberg v. Phenix Ins. Co.*, 49 Mo. App. 255; *Home Ins. Co. v. Wood*, 50 Nebr. 381, 69 N. W. Rep. 941, 26 Ins. L. J. 686; *Connecticut Ins. Co. v. Smith*, 10 Colo. 121, 51 Pac. Rep. 170; *Devereux v. Sun Fire Office*, 51 Hun, 147; *Harrison v. Hartford Ins. Co.*, 30 Fed. Rep. 862, 16 Ins. L. J. 787. And see preceding cases under 3.

6. *Westchester Ins. Co. v. Wagner*, 38 S. W. Rep. 214 (Tex. Civ. App.); *McHoney v. German Ins. Co.*, 52 Mo. App. 94; *German-Amer. Ins. Co. v. Davis*, 131 Mass. 316; *Devereux v. Sun Fire Office*, 51 Hun, 147; *Harrison v. Hartford Ins. Co.*, 30 Fed. Rep. 862, 16 Ins. L. J. 787; *Meiswinkel v. St. Paul F. & M. Ins. Co.*, 75 Wis. 147, 43 N. W. Rep. 669, 6 L. R. A. 200.

7. *Trustees St. Clara Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. Rep. 1140.

RULE 5.

No Reformation upon Proof of Claimant's Mistake Alone.

A policy cannot be reformed upon proof of claimant's mistake alone; it is an agent's duty to assume rights of applicants for insurance to be just as stated, and when he draws the policy accordingly there is no ground for reformation.

Moeller v. American Ins. Co., 52 Minn. 336, 54 N. W. Rep. 189, 22 Ins. L. J. 309; *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255; *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. Rep. 720. And see *Snow v. National Cotton Oil Co.*, 34 S. W. Rep. 177 (Tex. Civ. App.); *Mead v. Westchester Ins. Co.*, 64 N. Y. 453; *Farmville Ins. Co. v. Butler*, 55 Md. 233; *Dougherty v. Lion Ins. Co.*, 41 Misc. 285, 84 N. Y. Supp. 10, *aff'd*, 95 App. Div. 618, on opinion below.

RULE 6.

Fraud as Ground for Reformation — Duty in Preparation of Written Contract.

An agent whose duty it is to prepare a written contract in pursuance of a previous agreement, by preparing one materially changing the terms of such previous agreement and delivering it as in accordance therewith, commits a fraud, which entitles the other party to relief. Equity will reform a written instrument when there is mistake on one side and fraud upon the other.

Hay v. Star Ins. Co., 77 N. Y. 235; *Schuessler v. Fire Ins. Co. Phila.*, 103 App. Div. 12, 92 N. Y. Supp. 649; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Dalton v. Agricultural Ins. Co.*, Iowa, , 102 N. W. Rep. 125; *German Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. Rep. 112, 19 Ins. L. J. 228; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101; *Farnell v. Home Ins. Co.*, 136 Fed. Rep. 93,

C. C. A. ; *Williams v. North German Ins. Co.*, 24 Fed. Rep. 625, 626. And see *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. Rep. 185; *Dalton v. Providence-Washington Ins. Co.*, Iowa, , 102 N. W. Rep. 126; *Barnes v. Hekla Ins. Co.*, 75 Iowa, 11, 39 N. W. Rep. 122; *Franklin Ins. Co. v. Martin*, 11 Vroom, 568 (N. J.).
And see Rule 3.

RULE 7.

Fraud Must be Specifically Alleged.

Assured can have no remedy in equity upon the theory that, having paid the premium for a policy of insurance on his house, it is a fraud on him, having sustained a loss, not to pay it, because certain conditions are incorporated in the contract of which he was ignorant; if fraud is relied upon as ground of relief it must be specifically alleged; specific facts must be stated; a general charge is not sufficient.

Tolbert v. Caledonian Ins. Co., 101 Ga. 741, 28 S. E. Rep. 991.

RULE 8.

When Insured Bound by Acceptance of Policy — His Duty to Examine Policy.

When the evidence shows that there were no statements on part of the company's agent to mislead the assured or throw him off his guard, and the policy of insurance is accepted and held by the assured, and he does not discover the error until after the property is destroyed by fire, equity will afford no relief against such a mistake which resulted from carelessness and neglect.¹ It is the duty of insured to examine the policy, and when he retains it without objection for

over three months he cannot insist upon reformation after a loss.²

1. *Westchester Ins. Co. v. Wagner*, 38 S. W. Rep. 214 (Tex. Civ. App.).

2. *Steinberg v. Phoenix Ins. Co.*, 49 Mo. App. 255; *McHoney v. German Ins. Co.*, 52 Mo. App. 94. And see Rule 9.

And see Vol. 1, *Fire Insurance as a Valid Contract*, "Construction," Rule 5.

RULE 9.

Effect of Insured's Failing to Read Policy.

While the policy may be reformed, although the insured has held it until after a loss, in silence and ignorance, from omission to read the policy or careless reading, of necessity for reformation,¹ his mere ignorance affords no ground for relief when he has not been misled by some act or representation on the part of the insurance company or its agent;² the negligence of the assured in not discovering the mistake or change in language, and his laches in not seeking relief, are merely questions which make the propriety of granting reformation in a given case discretionary;³ or a circumstance proper to be considered by the court in weighing the testimony in determining whether a mistake was made.⁴

1. *Palmer v. Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. Rep. 248; *Fitchner v. Fidelity Ins. Assoc.*, 103 Iowa, 276, 72 N. W. Rep. 530; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342, 47 S. E. Rep. 101; *Van Tuyl v. Westchester Ins. Co.*, 55 N. Y. 657; *Farnell v. Home Ins. Co.*, 136 Fed. Rep. 93, C. C. A. . And see *Franklin Ins. Co. v. Hewitt*, 3 B. Mon. 231 (Ky.).

2. *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. Rep. 1003; *Palmer v. Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. Rep. 248, 16 Ins. L. J. 241; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283. And see Rule 8.

3. *Hay v. Star Ins. Co.*, 77 N. Y. 235.

4. *Van Tuyl v. Westchester Ins. Co.*, 55 N. Y. 657, aff'g 67 Barb. 72.

RULE 10.

Mutual Mistake as to Effect of Language — As to the Law.

A mutual mistake as to the effect of language used affords sufficient ground in equity for reformation of the contract by proper expression of what both parties intended to express;¹ so a mutual mistake as to the law induced by representations of the company's agent may be corrected in equity by reformation.²

1. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283. And see *Texas Ins. Co. v. Stone*, 49 Tex. 4; *Insurance Co. v. Lewis*, 48 Tex. 622; *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357.

2. *Sias v. Roger Williams Ins. Co.*, 8 Fed. Rep. 183, 10 Ins. L. J. 500; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227.

RULE 11.

Reformation as to Interest or Parties — Evidence.

A policy may be reformed in equity to state the correct name, interest, or parties mutually intended to be insured,¹ so when policy is issued to and in name of a deceased owner, heirs or other parties in interest may be substituted by reformation;² to justify reformation of a policy, by substituting or adding to the person insured, it must be established by the clearest and most satisfactory evidence that the policy as written does not contain or express the intention of both parties as to the person upon whom their minds actually met. The desire or intention of one of the parties alone is

not sufficient. A mere preponderance of evidence is not sufficient.³

1. *McCoubrey v. St. Paul F. & M. Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112, aff'd, 169 N. Y. 590, without opinion; *Lancashire Ins. Co. v. Lucas*, 34 S. W. Rep. 899 (Ky.); *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. Rep. 843; *Jamison v. State Ins. Co.*, 85 Iowa, 229, 52 N. W. Rep. 185; *Croft v. Hanover Ins. Co.*, 40 W. Va. 508, 21 S. E. Rep. 854, 24 Ins. L. J. 756; *Spare v. Home Ins. Co.*, 15 Fed. Rep. 708, 19 Fed. Rep. 14; *Abraham v. North German Ins. Co.*, 40 Fed. Rep. 717, 19 Ins. L. J. 511; *Williams v. North German Ins. Co.*, 24 Fed. Rep. 625, 14 Ins. L. J. 708; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. Rep. 229; *Devereux v. Sun Fire Office*, 51 Hun, 147; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Keith v. Globe Ins. Co.*, 52 Ill. 518; *Fink v. Queen Ins. Co.*, 24 Fed. Rep. 318, 16 Ins. L. J. 314; *German Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. Rep. 112, 19 Ins. L. J. 228. And see *Lansing v. Commercial Union Assur. Co.*, Nebr., 93 N. W. Rep. 756; *Balen v. Hanover Ins. Co.*, 67 Mich. 179, 34 N. W. Rep. 654; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.

2. *Taylor v. Glens Falls Ins. Co.*, 44 Fla. 273, 32 So. Rep. 887.

3. *Trustees St. Clara Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. Rep. 1140; *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645. And see *Schmidt v. Virginia F. & M. Ins. Co.*, 37 S. W. Rep. 1013, aff'd, orally, by Tenn. Sup. Ct., 37 S. W. Rep. 1015; *Snow v. National Cotton Oil Co.*, 34 S. W. Rep. 177 (Tex. Civ. App.); *Cushing v. Williamsburg City Ins. Co.*, 4 Wash. 538, 30 Pac. Rep. 736.

It was held in *Pelzer Mfg. Co. v. Hamburg-Bremen Ins. Co.*, 73 Fed. Rep. 826, aff'd, 76 Fed. Rep. 479, that a judgment might be reformed in equity to correct a clerical error in a verdict, there being no remedy at law.

RULE 12.

Effect of Changes in a Policy Requested as a Renewal — Right of Assignee to Reformation.

When a renewal is requested of an existing policy, to which the insurance company agrees, and a policy

issues upon such request, the mutual intent is to renew the insurance as asked for, and if the insurance company inserts new clauses or conditions without assent of the insured it is proper to strike same out by reformation;¹ an assignee of the policy with interest in it after a fire may maintain a suit for reformation.²

1. *Thomason v. Capital Ins. Co.*, 92 Iowa, 72, 61 N. W. Rep. 843; *Palmer v. Hartford Ins. Co.*, 54 Conn. 488, 9 Atl. Rep. 248, 16 Ins. L. J. 241.

2. *Benesh v. Mill Owners' Ins. Co.*, 103 Iowa, 465, 72 N. W. Rep. 674.

RULE 13.

When not Necessary to Have Policy Reformed.

When the facts are such as to create an estoppel or waiver, preventing the company from taking advantage of a defense or breach of a condition it is not necessary to have the policy reformed by a bill in equity;¹ so when building is sufficiently identified as the one intended by knowledge of the agent who wrote the policy, his error in description of location on a corner of certain named streets, in stating one of the streets by wrong name, does not require reformation.²

1. *German Ins. Co. v. Miller*, 39 Ill. App. 633; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322.

And see Vol. 1, *Fire Insurance as a Valid Contract*, chapter on "Waiver and Estoppel."

2. *American Central Ins. Co. v. McLanathan*, 11 Kans. 533.

RULE 14.

Right to Reformation as Affected by Misrepresentation.

A court of equity will not reform a contract of insurance if its execution was procured by the false rep-

representations of the party who is seeking to have it corrected; it will not decree its specific performance. And this is the rule even if the party did not know of its falsity and had no intent to deceive; nor does his belief in its truth make any difference. The question is, has the other party been misled by a false representation relating to the substance or essence of the contract; for instance, the title to the property insured? Policy having been obtained in name of one owner, when in fact the property described, or part of it, was, in fact, owned by another, upon a misrepresentation as to title, a bill for relief by reformation to cover all the property should be dismissed.

Cushman v. New England Ins. Co., 65 Vt. 569, 27 Atl. Rep. 426, 23 Ins. L. J. 41.

RULE 15.

Right to Reformation as Affected by Remedy at Law.

It is no answer to a suit by the insured for reformation that there is or might have been a remedy in action at law;¹ but the insurance company can have no relief in equity after a loss in respect to those matters which by law afford a complete defense in an action upon the policy.²

1. *Western Assur. Co. v. Ward*, 75 Fed. Rep. 338, 41 U. S. App. 443; *Delaware State Ins. Co. v. Gillett*, 54 Md. 219.

2. *Imperial Ins. Co. v. Gunning*, 81 Ill. 236.

RULE 16.

Suit to Reform not Sustainable After Failure in Action at Law.

After the insured has failed in an action at law upon the policy as written, he cannot sustain a suit for reformation.

Washburn *v.* Great Western Ins. Co., 114 Mass. 175. And see Steinbach *v.* Relief Ins. Co., 77 N. Y. 498; Thomas *v.* United Firemen's Ins. Co., 108 Ill. App. 278. *Contra*, Grand View Building Assoc. *v.* Northern Assur. Co., Nebr., 102 N. W. Rep. 246.

RULE 17.

Reformation Does not Require New Proof of Loss.

A reformation of the policy does not require the insured to furnish new or further statement or proof of loss.

Maher *v.* Hibernia Ins. Co., 67 N. Y. 283.

RULE 18.

Correction of Mistake by Agent After Loss.

An agent who has by mistake omitted a clause in the policy may insert same as originally agreed, even after a loss has occurred, specially when the policy remains in his custody and not delivered.

McLaughlin *v.* American Ins. Co., Iowa, , 101 N. W. Rep. 765.

TITLE IX.

Contract as Affected by Legality or Violation of Statute.

- RULE**
1. Wager policies — No insurable interest.
 2. Intent of insurance contract as affecting its legality
— Contract collateral — Question of fact.
 3. Effect of permission of insured to use for unlawful purpose.
 4. Effect of specific provision in policy as to use for unlawful purpose.
 5. As affected by insured's failure to procure license —
When contract not void as against public policy —
When ownership not unlawful.
 6. Effect of statute imposing a privilege tax.
 7. Contract made on Sunday.
 8. When contract not void as in restraint of trade.
 9. Effect of statute requiring foreign corporation to
procure certificate to transact business on right
to obtain insurance.

RULE 1.**Wager Policies — No Insurable Interest.**

Mere wager policies of fire insurance, without insurable interest to sustain them, are void at common law, irrespective of any statute;¹ a policy may cover future products or production of the insured in course of his business, trade, or calling, without being subject to objection that it is a wager policy.²

1. *Freeman v. Fulton Ins. Co.*, 14 Abb. Pr. 398 (N. Y.).
And see this volume, title "Insurable Interest."

2. *Sawyer v. Dodge County Ins. Co.*, 37 Wis. 503.

RULE 2.**Intent of Insurance Contract as Affecting its Legality — Contract Collateral — Question of Fact.**

When the direct purpose or intent of the insurance contract is to effect, advance, or encourage acts in vio-

lation of law it is void; but if collateral and independent, though in some measure connected with acts done in violation of law, the contract cannot be claimed to be void. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected. The distinction is between the cases where the contract is void in its inception, entered into for the purpose of protecting a prohibited traffic, and those cases where the contract is collateral, and into which no illegal design enters, although by subsequent acts of the assured it becomes remotely connected with illegal transactions;¹ the question is one proper to be determined by a jury.²

1. *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; *Niagara Ins. Co. v. DeGraff*, 12 Mich. 124; *Boardman v. Merrimack Ins. Co.*, 8 Cush. 583 (Mass.); *Kelly v. Home Ins. Co.*, 97 Mass. 288; *Johnson v. Union Ins. Co.*, 127 Mass. 556; *Armstrong v. Toler*, 11 Wheat. 271 (U. S.); *Ocean Ins. Co. v. Polleys*, 13 Pet. 157 (U. S.); *Erb v. German-Amer. Ins. Co.*, 98 Iowa, 606. And see *Shedlinsky v. Budweiser Brewing Co.*, 163 N. Y. 439.

While this last case was not an insurance case, it very tersely states the rule or principle. The court says: "It is a generally accepted rule that when a contract is to do a thing which cannot be performed without the violation of the law, it is void; but when it may be performed lawfully, as well as in violation of the law, it is valid, in the absence, at least, of proof that the intention of both parties was that the law should be violated. The construction of a contract should be, when it is possible, in favor of its legality."

2. *Carrigan v. Lycoming Ins. Co.*, *supra*.

RULE 3.

Effect of Permission of Insured to Use for Unlawful Purpose.

The insured may permit an insured building to be used for a purpose made unlawful by statute, such as

the drawing of a lottery, and if there is no language in the policy prohibiting same it does not affect the insurance.

Boardman v. Merrimack Ins. Co., 8 Cush. 583 (Mass.).
See Rule 4.

RULE 4.

Effect of Specific Provision in Policy as to Use for Unlawful Purpose.

When the policy provides that, if the premises should be used for an unlawful purpose, it shall become void, the mere fact that the insured, a druggist, has not complied with a statute as to registry does not establish a breach of the condition; the law does not require that the owner of the property, or one conducting such business, shall be a registered pharmacist; the insured may conduct such business by employing a duly qualified pharmacist.

Erb v. German Ins. Co., 99 Iowa, 398, 68 N. W. Rep. 701;
Erb v. Fidelity Ins. Co., 99 Iowa, 727, 69 N. W. Rep. 261.

Some of the old forms in terms prohibited use of building "for unlawful purposes," and it was held that the habitual use for an unlawful purpose voided the policy, even if unknown to the assured.

Kelly v. Worcester Ins. Co., 97 Mass. 284.

But see also *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, where it was held that policy may be only suspended while illegality exists, and revives when the illegality ceases.

And see this volume, "Increase of Hazard," Rule 20.

RULE 5.

As Affected by Insured's Failure to Procure License — When Contract not Void as Against Public Policy — When Ownership not Unlawful.

The insured is not affected by his mere failure to procure a license as required by statute to sell liquors;¹

so conducting a business in violation of a statute does not void the insurance,² unless the statute in terms makes the contract void.³ When policy covers a stock of drugs and liquors, the fact that the assured uses a part of the property covered for an unlawful purpose, that is susceptible of legitimate use in his business, does not render the insurance contract void as against public policy;⁴ though it may be put in issue whether liquors covered by the policy were owned by the insured with intent or for the purpose of sale in violation of the law, and if he does not intend to sell them in the State, or if he intends to sell them outside of the State, his ownership is not unlawful.⁵

1. *Manchester Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. Rep. 759, 27 Ins. L. J. 855. And see prior appeal, 108 Ala. 180, 197; *Niagara Ins. Co. v. DeGraff*, 12 Mich. 124; *Erb v. German-Amer. Ins. Co.*, 98 Iowa, 606, 67 N. W. Rep. 583.

2. *Petty v. Mutual Ins. Co.*, 111 Iowa, 358, 82 N. W. Rep. 767.

3. See Rules 2-4, 6.

4. *Erb v. German-Amer. Ins. Co.*, 98 Iowa, 606, 67 N. W. Rep. 583.

5. *Erb v. German-Amer. Ins. Co.*, *supra*. And see *Kelly v. Home Ins. Co.*, 97 Mass. 288; *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418, 10 Ins. L. J. 606.

RULE 6.

Effect of Statute Imposing a Privilege Tax.

When a statute imposes what is called a privilege tax upon stocks of goods, the failure of the insured to comply therewith renders his business illegal, and when such a statute in terms provides that "all contracts made with any person who violates the law shall be null and void," it includes a policy of insurance

which thereby becomes void, and no recovery can be had thereon;¹ but the statute affords no defense if the tax is fully paid at time the policy issues,² or if the fire occurs before the insured begins business.³

1. *American Ins. Co. v. First Nat. Bank*, 73 Miss. 469, 18 So. Rep. 931; *Sun Mutual Ins. Co. v. Searles*, 73 Miss. 62, 18 So. Rep. 544; *Pollard v. Phoenix Ins. Co.*, 63 Miss. 244, 15 Ins. L. J. 376.

2. *Springfield F. & M. Ins. Co. v. Fowler*, Miss. , 31 So. Rep. 810; *Sneed v. British America Assur. Co.*, 72 Miss. 51, 17 So. Rep. 281.

3. *Home Ins. Co. v. Lowenthal*, Miss. , 36 So. Rep. 1042.

RULE 7.

Contract Made on Sunday.

A contract of insurance made on Sunday is void, unless there is evidence of subsequent ratification.

Heller v. Crawford, 37 Ind. 279.

RULE 8.

When Contract not Void as in Restraint of Trade.

A policy which provides that the insurance shall not inure to the benefit of any carrier cannot be claimed to be void as being in restraint of trade.

Insurance Co. N. A. v. Easton, 73 Tex. 167.

RULE 9.

Effect of Statute Requiring Foreign Corporation to Procure Certificate to Transact Business on Right to Obtain Insurance.

A statute which requires a foreign corporation to procure a certificate of the Secretary of State before it can legally transact business within the State, or maintain any action upon any contract made by it in

the State, does not prevent a foreign corporation from obtaining through a broker a policy of insurance against fire upon its property in another State, and enforcing the same by action, without such certificate.

Cummer Lumber Co. v. Associated Manufacturers' Ins. Co., 67 App. Div. 151, 73 N. Y. Supp. 668, aff'd, 173 N. Y. 633, without opinion.

While beyond the scope of this work, the following notes may be found useful:

Combination to maintain rates.—It is not criminal at common law for insurance companies to combine or agree to maintain rates.

Ætna Ins. Co. v. Commonwealth, 106 Ky. 864, 51 S. W. Rep. 624, 45 L. R. A. 355.

But it may be made so by statute.

State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. Rep. 595, 45 L. R. A. 363. And see *State v. Ætna Ins. Co.*, 150 Mo. 113, 51 S. W. Rep. 413, 28 Ins. L. J. 856.

A combination of fire companies for the purpose of maintaining rates, prevention of rebates, regulating compensation of agents, and intercourse between themselves and those companies which are not members, is not an illegal combination or conspiracy, and the making effective such objects by lawful means will not be enjoined upon a bill filed by a nonmember. Dismissal of an agent for refusal to represent the associated companies exclusively, and refusal to place insurance for outside companies, are lawful means.

Falsely advertising authority to cancel for an outside company, and threats to boycott agents and customers of outside companies, are illegal and will be enjoined.

Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. Rep. 310, 24 Ins. L. J. 561.

Fire insurance companies may join in a suit in equity against the State Insurance Commissioner to restrain him from illegally revoking their certificates of authority to do business in the State and canceling their bonds; the fact that a number of them are members of an alleged illegal combination to suppress competition does not prevent the maintenance of such a suit.

Liverpool, L. & G. Ins. Co. v. Clunie, 88 Fed. Rep. 160.

Insurance is a commodity within the Iowa statute forbidding combinations or confederations between individuals or corpora-

tions to regulate or fix the price of any commodity. An agreement between local agents to fix rates is within the operation of the statute, but an agent who was a party to such a compact cannot afterward recover damages from the other agents on account of the withdrawal of his agency, where he has violated the compact agreement. As the compact was illegal, he lost nothing but an illegal business, made so by a conspiracy to which he was a party.

Beechley v. Mulville, 102 Iowa, 602, 70 N. W. Rep. 107, rehearing denied, 102 Iowa, 611, 71 N. W. Rep. 428.

A combination by insurance companies to fix rates of insurance and commissions of agents is not prohibited by chapter 117, Acts of Twenty-first Legislature of Texas, page 141, entitled "An act to define trusts and to provide for penalties and punishment of corporations, persons and firms, and associations, etc., to promote free competition in the State of Texas." Such a combination is not a "restriction in trade." Insurance is not a commodity; nor is it commerce, but an aid to commerce. Cases applicable to combinations in restraint of trade, cited and distinguished.

Queen Ins. Co. v. State, 86 Tex. 250, 24 S. W. Rep. 397, 23 Ins. L. J. 166.

The business of fire insurance companies is within the meaning and application of the statute of Mississippi prohibiting trusts and combinations.

Fire Insurance Companies v. State, 75 Miss. 24, 22 So. Rep. 99, 26 Ins. L. J. 860.

Insurance business is not interstate commerce, and the word "trade" in the Kansas statute (L. 1889, chap. 257), declaring unlawful trusts and combinations in restraint of trade, etc., does not mean interstate commerce. Foreign insurance companies that combine to control and increase rates of insurance violate the provisions of such act, and their local agents are liable to prosecution thereunder and to imposition of the penalty. The Kansas Legislature has the power to declare upon what terms and conditions a foreign insurance company may do business within that State.

State v. Phipps, 50 Kans. 609, 31 Pac. Rep. 1097, 22 Ins. L. J. 345. See also *Southern Ins. Co. v. Williams*, 62 Ark. 382. And as to legality of pooling agreements between companies as to rates, see also *Metzger v. Cleveland*, 28 Ins. L. J. 176 (Ind. Supr.); the same opinion is also reported in 13 Ins. L. J. 855.

The Iowa statute (Code, § 1754) directed against agreements by insurance companies to maintain rates has been lately held

to be unconstitutional on a demurrer. *Greenwich Ins. Co. v. Carroll*, 125 Fed. Rep. 121. It is understood that an appeal has been or will be taken to U. S. Supreme Court.

Attorney's fees.—The courts do not agree as to the constitutionality of statutes imposing attorney's fees.

That such a statute is unconstitutional:

Phoenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. Rep. 67.

That it is constitutional:

Continental Ins. Co. v. Whitaker, Tenn., 79 S. W. Rep. 119; *L'Engle v. Scottish Union & Nat. Ins. Co.*, Fla., 37 So. Rep. 462; *Insurance Co. N. A. v. Bachler*, 44 Nebr. 549, 62 N. W. Rep. 911, 24 Ins. L. J. 481; *Farmers' Ins. Co. v. Cole*, Nebr., 93 N. W. Rep. 730; *British America Ins. Co. v. Bradford*, 60 Kans. 82, 55 Pac. Rep. 335, 28 Ins. L. J. 262; *German Ins. Co. v. Allen*, Kans., 77 Pac. Rep. 529.

The courts do not always seem to note the distinction between a statute imposing attorney's fees as such as part of the costs or expenses of an action, and a statute imposing a penalty by way of percentage upon the amount of the claim or insurance. One might be constitutional and the other not.

See Vol. 1, *Fire Insurance as a Valid Contract*, "Payment of the Loss," Rule 14, note.

Lloyds.—The validity of Lloyds insurance, when the liability for loss under the contract rests upon the individual underwriters, in the absence of statutes prohibiting the same, is well established, and so their power to do business in other States than the one in which the association was formed is unqualified in absence of limiting or prohibitory statutes.

Enterprise Lumber Co. v. Mundy, 62 N. J. L. 16, 42 Atl. Rep. 1063.

At common law a number of individuals might properly enter into mutual covenants to indemnify each other against loss by fire, and unless restricted by statute such agreements are still valid. A temporary Lloyds association or organization, acting through an attorney in fact, and temporary only pending proceedings to incorporate under the statute, is legal, and the liability of the individual subscribers for a loss may be enforced, and if necessary the assessment of the proportionate share of liability may be ascertained and decreed by suit in equity.

Clark v. Spafford, 47 Ill. App. 160.

There being no restriction or prohibition by statutes of Illinois against the legal right of citizens of that State to engage in the insurance business in the making of individual contracts of insurance, a citizen of a foreign State may in that State

exercise the same right, and a general provision of the Illinois statute, or Insurance Act, making it applicable to "all foreign companies, partnerships, associations, and individuals, whether incorporated or not," cannot constitutionally impose a restriction on the citizens of other States not imposed upon the citizens of Illinois. Therefore *held* that an agent of a New York Lloyds in Illinois was not subject to the penalty imposed by the Insurance Act of Illinois (R. S. 1874).

Barnes v. People ex rel. Moloney, 168 Ill. 425, 48 N. E. Rep. 91.

When a Lloyds organization or association in effect limits their liability to the amount of money contributed by each subscriber, and assumes to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives, it is acting as a corporation without being legally incorporated, and hence in Illinois, under the statute of that State, cannot legally transact business, being liable to the judgment of ouster in *quo warranto* proceedings. The fact that the subscribers may be legally individually liable does not change the result. Individuals may insure property against loss by fire, and if they will carry on that business must either openly act upon their responsibility as individuals or they must become incorporated.

Greene v. People, 150 Ill. 513, 37 N. E. Rep. 842.

The business of insurance against loss by fire is, by reason of its magnitude, its importance to property-owners, and the nature of the business, a proper subject for the exercise of the police power of a State. The Pennsylvania Act of 1870, prohibiting any person, partnership, or association, from making any contract of insurance against loss by fire, without authority expressly conferred by a charter of incorporation, is a valid exercise of the police power. It does not prohibit but regulates the business. It excludes no one from engaging in it, but prescribes the preliminary qualifications necessary for all alike, to entitle them to enter the business. It is open to all under general laws and is not burdensome. Its only effect is to secure adequate capital at the beginning and State supervision during the continuance of the business. Nature of the police power of a State as applicable to the insurance business considered at length.

Commonwealth v. Vrooman, 164 Pa. St. 306, 30 Atl. Rep. 217, 25 L. R. A. 250.

The decision in this case was by a divided court. Three of the judges concurred in a dissenting opinion.

Under the Pennsylvania Act of May 1, 1876, section 47, and

April 4, 1873, the words "insurance companies" refer only to incorporated companies and not to Lloyds or individual underwriters. An insurance agent who, without the prescribed license, acts as agent of such Lloyds of another State is not liable to the penalty by such statute imposed.

Commonwealth v. Reinöehl, 163 Pa. St. 287, 29 Atl. Rep. 896.

Upon request of the Insurance Commissioner for advice, the Attorney-General held (December 10, 1894) that in the then present state of the law and decisions in Pennsylvania, citing *Commonwealth v. Vrooman*, 164 Pa. St. 306, that no license to do an insurance business in Pennsylvania should be granted to a Lloyds association organized in New York; that such business was unlawful and subjected persons in that State, acting for them, to the penalties prescribed.

Re Lloyds Association, 15 Pa. Co. Ct. 586.

The insurance statute of Ohio applies to foreign insurance companies and associations whether incorporated or not. A Lloyds organization or association of another State, whose acts are such as appertain to corporations or are done after the manner of corporations, is bound to obtain a certificate of authority as prescribed by the Ohio statute; if they attempt to conduct the business without such authority, they unlawfully exercise a franchise, or act as a corporation contrary to the statute, and in either view judgment of ouster will be entered in *quo warranto* proceedings.

State v. Ackerman, 51 Ohio St. 163, 37 N. E. Rep. 828.

Under the Texas statute of 1887, an agent of a Lloyds association of another State is not liable to penalty imposed. The law in question was held to apply only to chartered or incorporated companies. The court expressly recognized the power of the Legislature to change or amend the law so as to make such associations and their agents subject thereto.

Fort v. The State, 92 Ga. 8, 18 S. E. Rep. 14.

Citizens of New York associated in business as Lloyds, for the purpose of doing a foreign insurance business and not incorporated, are entitled to engage in that business with the same privileges and immunities as unincorporated citizens of the State of Alabama, and they are not required by the statute law of the latter State to obtain any license to do business in that State.

Hoadley v. Purifoy, 107 Ala. 276, 18 So. Rep. 220, 30 L. R. A. 351.

But note that it was so decided upon the ground that there was no statute law in force in the State of Alabama at the

time of the decision which embraced within its terms individuals or associations from other States not incorporated. In Pennsylvania there is a prohibitory clause which covers the Lloyds.

Commonwealth v. Vrooman, 164 Pa. St. 306.

It has been held, however, that where the State statute is in terms broad enough to include unincorporated associations, firms, and individuals, all nonresident individuals composing a Lloyds association are entitled to transact business within such State upon the same terms as its own citizens. Under the United States Constitution there can be no discrimination.

State ex rel. Hoadley v. Florida Ins. Comrs., 37 Fla. 564, 20 So. Rep. 772, 33 L. R. A. 288.

There is (or was) no statute preventing an insurance agent from doing business in the State of Indiana for a foreign association not incorporated under a foreign statute.

State v. Campbell, 17 Ind. App. 442, 46 N. E. Rep. 944.

As to taxation of Lloyds see *Fire Department v. Stanton*, 28 App. Div. 334, 51 N. Y. Supp. 242.

CHAPTER EIGHTH.

Statutory Provisions.

Alabama,	Montana,
Arkansas,	Nebraska,
California,	*New Hampshire,
Colorado,	New York,
Connecticut,	North Carolina,
Florida,	North Dakota,
Georgia,	Ohio,
Illinois,	Oklahoma,
Iowa,	Pennsylvania,
Kansas,	Rhode Island,
Kentucky,	South Carolina,
Louisiana,	South Dakota,
Maine,	Tennessee,
Maryland,	Texas,
Massachusetts,	Vermont,
Michigan,	Virginia,
Minnesota,	Washington,
Mississippi,	Wisconsin.
Missouri,	

(The following statutory provisions are intended to be inserted as relevant to the subject-matter of the previous chapters or titles of this volume, and do not include the statutes of the various states prescribing the conditions upon which fire insurance companies may be authorized to transact business, imposing penalties, or otherwise regulating the details of the business as to agents, reinsurance, etc., as between the state and the companies or their agents or penal statutes. It is intended to limit the insertion to such as affect the subjects *as between the insured and the company*. There may be occasional provisions inserted beyond such limitation and as affecting a subject as between the state and the company or an agent, but this is done for purpose of comparison or distinction. For instance, compare the statutory provisions of Alabama, Illinois, Iowa, and Wisconsin in regard to agents, and see this volume, title "Agents," Rules 97-106. This chapter includes legislation down to and including 1905, except in the case of Georgia, where the legislature is still in session as the work goes to press.)

* See statutory provisions, Vol. 1.

ALABAMA.

Civil Code, 1896, Volume 1.

§ 2602. **Contracts of insurance to be in plain language, free from ambiguity; rebates on premiums prohibited; penalty.**—No life, nor any other insurance company, nor any agent thereof, shall make any contract of insurance, nor agreement as to policy-contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow as inducement to insurance, any rebate of premiums payable on the policy, nor shall any particular policy-holder of the same class be allowed any advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy-contract of insurance. Any company or agent directly or indirectly violating this section shall be held guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars for the first offense, and shall be fined not less than two hundred and fifty dollars for each subsequent offense.

§ 2603. **Who are agents of foreign companies; penalty for acting without license.**—Any person who solicits insurance on behalf of any insurance company not organized under or incorporated by the laws of this state, until such company has fully complied with all the requirements of this article, and until such company has received from the insurance commissioner the certificate of authority to transact business of insurance in this state, or takes or transmits, other than for himself, any application for insurance, or any policy for insurance, to or from such company, or in any way gives notice that he will receive or transmit the same, or receives or delivers a policy of insurance of any such company, or examines or inspects a risk, or receives, collects, or transmits any premium of insurance, or makes or forwards any diagram of any building or buildings, or does or performs any other act or thing in the making or consummating of any contract of insurance with or for any insurance company, other than for himself, or examines or adjusts, or aids in adjusting any loss or on behalf of any such insurance company, whether any such acts shall be done at the request or instance or by the employment of such insurance company, or of or by any other person, shall be guilty of a misdemeanor, and upon conviction by a court having jurisdiction, shall be fined not less than one hundred dollars nor more than five hundred dollars, or may be imprisoned in the county

jail not more than thirty days, or both, at the discretion of the court.

§ 2604. **Liability of agent for loss sustained on contract unlawfully made by him.**— Any agent or person shall be personally liable for the full amount of loss sustained on all contracts of insurance unlawfully made by or through him, directly or indirectly for or in behalf of any insurance company not authorized by insurance commissioner to do business in this state at the time the application for such insurance was made, or at the date when such insurance policy became effective.

§ 2606. **When contracts of insurance regarded as made in this state.**— All contracts of insurance, the application for which is taken within the state, shall be deemed to have been made within this state, and subject to laws thereof.

ARKANSAS.

Laws of 1895, Act CXVII.

§ 1. That any person, who shall hereafter solicit insurance or procure applications, shall be held to be soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding.

Laws of 1899, Act LXXXV.

§ 1. That in all actions against any fire insurance company, individual or corporation, for any claim accruing or arising upon or growing out of any policy upon personal property issued by any such company, individual or corporation, proof of a substantial compliance with the terms, conditions and warranties of such policy, upon the part of the assured, or party, individual, person or corporation to whom it may have been issued, or their assigns, shall be deemed sufficient, and entitle the plaintiff to recover in any such action.

CALIFORNIA.

Pomeroy's Civil Code (1901).

§ 2546. **Insurable interest, what.**— Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

§ 2547. **In what may consist.**—An insurable interest in property may consist in:

1. An existing interest;
2. An inchoate interest founded on an existing interest; or,
3. An expectancy, coupled with an existing interest in that out of which the expectancy arises.

§ 2548. **Interest of carrier or depositary.**—A carrier or depositary of any kind has an insurable interest in a thing held by him as such, to the extent of its value.

§ 2549. **Mere expectancies.**—A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable.

§ 2550. **Measure of interest in property.**—The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof.

§ 2551. **Insurance without interest, illegal.**—The sole object of insurance is the indemnity of the insured, and if he has no insurable interest, the contract is void.

§ 2552. **When interest must exist.**—An interest insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the meantime.

§ 2553. **Effect of transfer.**—Except in the cases specified in the next four sections, and in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent, until the interest in the thing and the interest in the insurance are vested in the same person.

§ 2554. **Transfer after loss.**—A change of interest in a thing insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss.

§ 2555. **Change of interest.**—A change of interest in one or more of several distinct things, separately insured by one policy, does not avoid the insurance as to the others.

§ 2556. **In case of death of the insured.**—A change of interest, by will or succession, on the death of the insured, does not avoid an insurance; and his interest in the insurance passes to the person taking his interest in the thing insured.

§ 2557. **In the case of transfer between cotenants.**—A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

§ 2558. **Policy, when void.**— Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void.

§ 2561. **Concealment, what.**— A neglect to communicate that which a party knows, and ought to communicate, is called a concealment.

§ 2562. **Effect of concealment.**—A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.

§ 2563. **What must be disclosed.**— Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.

§ 2564. **Matters which need not be communicated without inquiry.**— Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows;
2. Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant;
3. Those of which the other waives communication;
4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and,
5. Those which relate to a risk excepted from the policy, and which are not otherwise material.

§ 2565. **Test of materiality.**— Materiality is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

§ 2566. **Matters which each is bound to know.**— Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry, equally with that of the other, and which may affect either the political or material perils contemplated; and all general usages of trade.

§ 2567. **Waiver of communication.**— The right to information of material facts may be waived, either by the terms of insurance or by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.

§ 2568. **Interest of insured.**—Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by section twenty-five hundred and eighty-seven.

§ 2569. **Fraudulent warranty.**—An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitled the insurer to rescind.

§ 2570. **Matters of opinion.**—Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question.

§ 2571. **Representation, what.**—A representation may be oral or written.

§ 2572. **When made.**—A representation may be made at the same time with issuing the policy, or before it.

§ 2573. **How interpreted.**—The language of a representation is to be interpreted by the same rules as the language of contracts in general.

§ 2574. **Representation as to future.**—A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation.

§ 2575. **How may affect policy.**—A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty.

§ 2576. **When may be withdrawn.**—A representation may be altered or withdrawn before the insurance is effected, but not afterward.

§ 2577. **Time intended by representation.**—The completion of the contract of insurance is the time to which a representation must be presumed to refer.

§ 2578. **Representing information.**—When a person insured has no personal knowledge of the fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information, in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured, whose duty it is to give the intelligence.

§ 2579. **Falsity.**—A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.

§ 2580. **Effect of falsity.**—If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false.

§ 2581. **Materiality.**—The materiality of a representation is determined by the same rule as the materiality of a concealment.

§ 2582. **Application of provisions of this article.**—The provisions of this article* apply as well to a modification of a contract of insurance as to its original formation.

§ 2583. **Right to rescind.**—Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract.

§ 2587. **What must be specified in a policy.**—A policy of insurance must specify:

1. The parties between whom the contract is made;
2. The rate of premium;
3. The property or life insured;
4. The interest of the insured in property insured, if he is not the absolute owner thereof;
5. The risk insured against; and,
6. The period during which the insurance is to continue.

§ 2588. **Whose interest is covered.**—When the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest.

§ 2589. **Insurance by agent or trustee.**—When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as agent or trustee, or by other general words in the policy.

§ 2590. **Insurance by part owner.**—To render an insurance effected by one partner or part owner applicable to the interest of his copartners or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest.

§ 2591. **General terms.**—When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.

§ 2592. **Successive owners.**—A policy may be so framed that it will inure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured.

§ 2593. **Transfer of the thing insured.**—The mere transfer of a thing insured does not transfer the policy, but suspends it until the same person becomes the owner of both the policy and the thing insured.

* Sections 2561–2582.

§ 2594. **Open and valued policies.**—A policy is either open or valued.

§ 2595. **Open policy, what.**—An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss.

§ 2596. **Valued policy, what.**—A valued policy is one which expresses on its face an agreement that the thing insured shall be valued as a specified sum.

§ 2597. **Running policy, what.**—A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.

§ 2598. **Effect of receipt.**—An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.

§ 2599. **Agreement not to transfer.**—An agreement, made before a loss, not to transfer the claim of a person insured against the insurer after the loss has happened is void.

§ 2603. **Warranty, express or implied.**—A warranty is either express or implied.

§ 2604. **Form.**—No particular form of words is necessary to create a warranty.

§ 2605. **Warranty must be in policy.**—Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it.

§ 2606. **Past, present, and future warranties.**—A warranty may relate to the past, the present, the future, or to any or all of these.

§ 2607. **Warranty as to past or present.**—A statement in a policy, of matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof.

§ 2608. **Warranty as to the future.**—A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place.

§ 2609. **Performance excused.**—When, before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, or performance becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy.

§ 2610. **What acts avoid the policy.**—The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind.

§ 2611. **Policy may provide for avoidance.**—A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.

§ 2612. **Breach without fraud.**—A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception, prevents the policy from attaching to the risk.

§ 2616. **When premium is earned.**—An insurer is entitled to payment of the premium as soon as the thing insured is exposed to the peril insured against.

§ 2617. **Return of premium.**—A person insured is entitled to a return of premium paid as follows:

1. To the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against;
2. Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.

§ 2618. **When return not allowed.**—If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned.

§ 2619. **Return for fraud.**—A person insured is entitled to a return of the premium when the contract is voidable, on account of the fraud or misrepresentation of the insurer, or on account of facts of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.

§ 2641. **Double insurance.**—A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest.

§ 2646. **Reinsurance, what.**—A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.

§ 2647. **Disclosures required.**—Where an insurer obtains reinsurance he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk.

§ 2648. **Reinsurance presumed to be against liability.**—A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage.

§ 2649. **Original insured has no interest.**—The original insured has no interest in a contract of reinsurance.

§ 2753. **Alteration increasing risk.**—An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.

§ 2754. **Alteration not increasing risk.**—An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

§ 2755. **Acts of the insured.**—A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss.

COLORADO.

Mill's Annotated Statutes, 1891.

§ 2234. **Superintendent of insurance shall have power to examine form of policy contract—cancellation.**—That the superintendent of insurance shall have power and it shall be his duty to examine the form of all policy contracts hereafter issued, or proposed to be issued, by any fire insurance company, association or corporation now authorized by law, or that may hereafter apply to be authorized to transact business of fire insurance in this state. The superintendent of insurance shall refuse to authorize any such company, association or corporation to do business in this state whenever the form of policy contract issued, or proposed to be issued, by any such company, association or corporation does not provide for the cancellation of the same at the request of the insured, upon equitable terms, nor whenever the form of policy does not provide that in case the policy shall be cancelled at the request of the insured, the premium having been actually paid, that the unearned portion thereof shall be returned on surrender of the policy or last renewal, the company in no event retaining an amount in excess of the amount shown to be the earned portion of said premium, as per the customary short rate table.

CONNECTICUT.

General Statutes, 1902.

§ 3526. **Notice before cancellation of policy.**— No insurance company or association shall cancel a policy issued against loss by fire on property in this state without giving the party insured at least five days' notice, in writing, of such intention and returning the ratable proportion of the premium for the unexpired term of the policy.

§ 3616. **When agent is personally liable.**— The agent of any insurance company of another state or of any foreign government, which has not been admitted to transact business in this state, shall be personally liable upon all contracts of insurance made by or through him, directly or indirectly, for or in behalf of any such company.

§ 3620. **Term "agent" defined.**— The term "agent" or "agents" used in this title shall include an acknowledged agent or surveyor, and any person who shall in any manner aid in transacting the business of an insurance company.

§ 3630. **Term "insurance broker" defined.**— Whoever for compensation acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks, or effecting insurance or reinsurance for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no such person shall act as such broker except as provided in §§ 3631, 3632, and 3633.

§ 3496. **Conditions, to be stated in body of policy.**— In all policies of insurance against loss by fire, made by companies chartered by or doing business in this State, no condition shall be valid unless stated in the body of the policy.

§ 3631. **Powers of agents.**— The authorized agent of any company legally admitted to do business in this state may, without being deemed a broker or procuring a broker's certificate of authority, negotiate or effect contracts of insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in this state of any foreign insurance company admitted to do business in this state.

§ 3632. **License to insurance broker.**— The insurance commissioner may, upon the payment of a fee of ten dollars, issue to any person a certificate of authority to act as an insurance broker to negotiate contracts of insurance or reinsurance or place risks or effect insurance or reinsurance with any qualified domestic insurance company or its agents, and with the

authorized agents in this state of any foreign insurance company duly admitted to do business in this state. Said commissioner may pro-rate the fee for such certificate in proportion to the time such certificate has to run; but no such certificate shall be issued for less than three dollars.

§ 3633. **License; term and revocation.**—Such certificate shall remain in force as provided in § 3634, unless it is otherwise stated therein, or unless revoked by the commissioner for cause. Such cause shall exist upon conviction of the holder of such certificate of a violation of the insurance laws, or whenever it shall appear to the commissioner upon due proof after notice, that the holder has unreasonably failed and neglected to pay over to the company or agent entitled thereto any premium or part thereof collected by him on any policy of insurance. The commissioner shall publish such revocation in such manner as he deems suitable for the protection of the public.

(Section 3634 provides for continuance in force of certificate or license until first of April following unless otherwise provided or revoked.)

FLORIDA.

Revised Statutes, 1891.

§ 2224. **Agents.**—Any person or firm in this State who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for any such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual. (As amended by L. 1895, chap. 4380, § 7.)

Laws 1905.

§ 1. That in the event of a total loss or destruction of any personal property on which the amount of the appraised or agreed loss shall be less than the total amount insured thereon, the insuring company or companies shall return to

the insured the unearned premium for the excess of insurance over the appraised or agreed loss, to be paid at the same time and in the same manner as the loss shall be paid, and the said unearned premium shall be a just and legal claim against the said insurance company or companies.

§ 2. That all laws or parts of laws in conflict with the provisions of this act be and the same are hereby repealed.

§ 3. That this act shall be of full force and effect from and after its passage and approval by the Governor.

Approved May 16, 1905.

GEORGIA.*

Code of 1895, Vol. II, part I.

§ 2054. **Definition of insurance agent.**— Any person who solicits in behalf of any insurance company, or agent of the same, incorporated by the laws of this or any other State or foreign government, or who takes or transmits, other than for himself, any application for insurance or any policy of insurance to or from such company, or agent of the same, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk at any time, or receive or collect or transmit any premiums of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or in behalf of any such company, whether any such acts shall be done at the instance or request or by the employment of such insurance company, or of, or by, any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken.

§ 2055. **Penalty on agents of unauthorized companies.**— Any person who shall do or perform any of the acts or things mentioned, for any insurance company or agent of said company, without such company having first received a certificate of authority from the insurance commissioner of this State as required by law, shall be guilty of a misdemeanor, and shall also pay a sum equal to the State, county and municipal taxes and licenses required to be paid by insurance companies legally

* The Legislature is in session as book is being printed, hence it is impossible to insert amendments in Laws of 1905.

doing business in this State; and it is hereby made the duty of the insurance commissioner to see that all violators of the provisions of this section are prosecuted.

§ 2056. **Civil liability.**—Any person who shall do any of the acts mentioned in the preceding sections shall also be personally liable to the holder of any policy of insurance, in respect of which such act was done, for any loss covered by the same: Provided, that the penalties provided for shall not apply to adjusters or inspectors of authorized insurance companies from whom the citizens of this State have purchased insurance for themselves, as provided for in this section, whenever the person or persons purchasing said insurance shall immediately notify the insurance commissioner, giving the name and locality of said company in which they have policies, and at the same time pay to said insurance commissioner the same licenses, fees and taxes for each company as are now or may hereafter be required of fire-insurance companies authorized to do business by the laws of this State; and when the license fees for any company have been paid in any one year by any person or persons who have purchased insurance from said company, then, in that case, any person or persons purchasing insurance from said company thereafter shall not be liable for the license fees of said company during the said year, but only for such taxes on premiums as may be required from time to time of insurance companies authorized to do business in this State: Provided further, that it shall not be lawful for said inspectors to solicit business for their companies.

§ 2089. **Contract of fire insurance.**—The contract of fire insurance is one whereby an individual, or company, in consideration of a premium paid, agrees to indemnify the assured against loss by fire to the property described in the policy, according to the terms and stipulations thereof. Such contract, to be binding, must be in writing; but delivery is not necessary if, in other respects, the contract is consummated.

§ 2090. **Interest of assured.**—To sustain any contract of insurance, it must appear that the assured has some interest in the property or event insured, and such as *here presented himself to have. A slight or contingent interest is sufficient, whether legal or equitable, and several having different interests may unite in procuring one policy; so a husband or parent may insure the separate property of his wife or child, the recovery being held by him in trust for them; but a mere expectation of an interest is not insurable.

* So in statute as printed. Doubtless a typographical error for "he represented."

§ 2091. **Insuring interest of another.**— If one undertakes to insure the interest of another, it must be done by his consent, or be subsequently ratified by him; but an insurer may reinsure to protect himself against loss on his contract.

§ 2092. **Insurance on changing property.**— A policy of insurance may be made to cover property changing daily in its specific articles, as a stock of goods.

§ 2093. **Construction.**— The contract of insurance should be construed so as to carry out the true intention of the parties.

§ 2095. **Loss unknown to the parties.**— If the loss has already occurred, and both parties are ignorant of it, the contract is valid; but the slightest grounds of suspicion known to the insured will vitiate the contract, unless made known to the insurer.

§ 2097. **Application, good faith.**— Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed, will void the policy.

§ 2098. **Effect of misrepresentation.**— Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representation of others, bona fide, and so informs the insurer, the falsity of the information does not void the policy.

§ 2099. **Concealment.**— A failure to state a material fact, if not done fraudulently, does not void; but the willful concealment of such a fact, which would enhance the risk, will void the policy.

§ 2100. **Increasing risk.**— Any change in the property, or the use to which it is applied, without consent of the insurer, whereby the risk is increased, voids the policy.

§ 2101. **Willful misrepresentation voids policy.**— Willful misrepresentation by the assured, or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy.

§ 2102. **Effect of alienation.**— An alienation of the property insured, and a transfer of the policy, without the consent of the insurer, voids it; but the mere hypothecation of the policy, or creating a lien on the property, does not void.

§ 2103. **Transfer to one of several.**— A policy issuing to several, may be transferred to one of the assured without the consent of the insurer.

§ 2104. **Partial sale.**—A partial sale of property insured, voids the policy only pro tanto. A sale not fully executed, and possession remaining with the assured, does not void.

§ 2107. **Second insurance.**—A second insurance on the same property, unless by consent of the insurer, voids his policy.

ILLINOIS.

Agents.—Under the Illinois statute prescribing upon what terms foreign Insurance Companies may do business in the State. "The term agent or agents used in the statute shall include any acknowledged agent, surveyor, broker, or any other person or persons, who shall in any manner aid in transacting the business of any insurance company not incorporated by the laws of one of the United States." Hinds R. S. Ill. 1901, p. 1020.

IOWA.

Code of 1897.

§ 1741. **Copy of application.**—All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option.

§ 1749. **Advertisements — Soliciting agents.**—Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which it is located, and the state or government under the laws of which it is organized. Any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or

on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding.

§ 1750. **Who deemed agent.**—The term agent used in the foregoing sections of this chapter shall include any other person who shall in any manner directly or indirectly transact the insurance business for any insurance company complying with the laws of this state. Any officer, agent or representative of an insurance company doing business in this State who may solicit insurance, procure applications, issue policies, adjust losses or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws or articles of incorporation of such company to the contrary notwithstanding.

KANSAS.

Laws of 1903, Chapter 333.

§ 1. Any condition or stipulation in an application, policy or contract of fire insurance hereafter made making the policy void in case the insured premises become vacant shall not prevent recovery on such policy, if it shall be shown by the plaintiff that the insured premises had ceased to be vacant and were occupied at the time of the loss.

KENTUCKY.

Statutes, 1903.

§ 633. **Agents of foreign companies — Who are — Penalty for doing business without license.**—Licenses to agents of foreign companies must be renewed annually in the same manner as original licenses, upon a finding by the Commissioner that the company represented by the agent has fully complied with the law and maintains its required capital or reserve; and whoever solicits and receives application for insurance on behalf of any insurance company, or transmits for any person other than himself an application for insurance or a policy of insurance to or from such company, or advertises that he will receive or transmit the same, or who shall, in any manner, directly or indirectly, aid or assist in transacting the insurance business of any insurance company, shall be held to be an agent of such company within the meaning of this article, anything in the policy or application to the contrary notwithstanding; and any

person acting as the agent of any company within the meaning of this section, without first procuring and having a license from the Commissioner to act as such agent, or, after such license has expired, been suspended or revoked, or who shall procure any premium or obligation therefor by fraudulent representations, shall be deemed and held to be guilty of a misdemeanor, and, upon conviction for such offense, shall be fined not less than fifty nor more than one hundred dollars for each offense.

§ 638. **Insurance made in violation of law — Penalty upon agent.**—If insurance is made by any company as authorized by this law to be made, but without a compliance with the requirements of the laws of this State, the contract shall be valid; but the agent or person making the insurance shall be liable to a fine not exceeding one thousand dollars for each offense.

§ 639. **Warranties — Statements by insured that are not.**—All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy.

LOUISIANA.

1. Revised Laws of, 1904.

§ 4 (p. 858). **Who shall be deemed agents.**—Be it further enacted, etc., Any person who in this State solicits or procures policies or risks from, or in any insurance company, corporation, association, partnership or combination of persons, mentioned in Section 3, except such risks be upon his own property or person, or who in any manner, except as provided in the aforesaid Section 3, aids the transaction of business in this State by any such company, corporation, association, partnership, or combination of persons, that has neglected or refused to comply with all the laws of this State relative to such companies, corporations, associations, partnerships or combination of persons, shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned for not less than thirty (30) days nor more than ninety (90) days.

§ 23 (p. 864). **No commissions to any but authorized agents.**—Any person who solicits insurance for a consideration on behalf of any insurance company, or transmits for a person other than himself an application for, or a policy of insurance to or from such company, or offers or assumes to act in the negotiation of such insurance, shall be deemed an insurance agent within the intent of this Act, should he receive from the

company any compensation whatsoever, either for himself or for any other person, partnership, or corporation, and shall thereby become liable to all the duties, requisitions, liabilities and penalties to which an agent of such company is subject.

§ 5 (p. 895). **Acting as agent without certificate, penalty.**—Be it further enacted, etc., That any person who in this State, solicits or procures policies or risks from or in any insurance company, corporation or association, partnership or combination of persons, except such risks be upon his own property, or life or health, or who in any manner aids the transaction, of business in this State, by any such company, corporation or association, partnership or combination of persons, without having first secured a certificate of authority from the Secretary of State, showing his authority to act as such agent, shall lay himself liable to a penalty for having failed to do so, of a fine of not less than one hundred dollars, nor more than three hundred dollars, or to imprisonment for not less than thirty days, nor more than ninety days, upon conviction before a court of competent jurisdiction. Any agent, solicitor or representative, who attempts to solicit insurance or represent a company, corporation or association after his certificate of authority has been revoked will subject himself to the same penalty and liability.

MAINE.

Revised Statutes of 1903* (Chap. 49).

§ 14 (p. 475). Insurance effected by a husband or wife on a dwelling-house owned by the insured and on the furniture therein, is valid for all the furniture, although part is owned by the husband and part by the wife.

§ 22. **Person deemed agent; notice to him binding.**—An agent authorized by an insurance company, whose name is borne on the policy, is its agent in all matters of insurance; any notice required to be given to said company or any of its officers, by the insured, may be given to such agent.

§ 76 (p. 486). **Inquest into insurance frauds.**—On application in writing to the commissioner by an officer of any insurance company doing business in the state, stating that he has reason to believe and does believe that any person has, by false representations, procured from said company an insurance, or that the company has sustained a loss by the fraudulent act of the insured, or with his knowledge or consent, and requesting

* The R. S. 1903, and Repealing Act, Id. p. 1015, would seem to repeal other material provisions of prior statutes.

an investigation thereof, said commissioner, or his deputy or such magistrate as he appoints, shall summon and examine, under oath, at a time and place designated by him, any persons, and require the production of all books and papers necessary for a full investigation of the facts, and make report thereof, with the testimony by him taken, to the company making such application.

§ 96 (p. 490). **Insurance agents and brokers.**—The insurance commissioner may issue a license to any person to act as an agent of a domestic insurance company, or of any steam boiler insurance company authorized to do business in the state, upon his filing with the commissioner a certificate from the company or association, or its authorized agent, empowering him so to act; and to any resident of the state to act as an agent of any foreign insurance company, which has received a license to do business in the state as provided in section seventy-nine upon his filing such certificate. Such license shall continue until the first day of the next July. If any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he forfeits not more than fifty dollars for each offense; but any policy issued on such application binds the company if otherwise valid. Agents of duly authorized insurance companies may place risks with agents of other duly authorized companies when necessary for the adequate insurance of property, persons or interests. An insurance agent shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or in behalf of any company not authorized to do business in the state. Nothing herein contained shall require a duly licensed insurance agent or broker to obtain any license for an employee doing only clerical office work in the office of said agent or broker.

MARYLAND.

Public General Laws, 1903.

Art. 23. § 195 (p. 418). **Insurance broker.**—All licenses for the purpose of conducting the occupation or business of an insurance broker shall be granted by the insurance commissioner of the State of Maryland, and all such licenses granted by said commissioner shall expire on the first day of May thereafter. Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing

risks, or effecting insurance or reinsurance for a person other than himself, and not being duly appointed solicitor, agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker within the meaning of this article.

MASSACHUSETTS.

2. Revised Laws of, 1902.

Chap. 118. § 21 (p. 1128). **Misrepresentation and warranty.**—No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss.

§ 59 (p. 1146). **Statement of conditions — Application.**—In all insurance against loss by fire the conditions of insurance shall be stated in full, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy.

§ 91 (p. 1162). **Agent or broker — Premium.**—An insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance by an insurance company shall, for the purpose of receiving the premium therefor, be held to be the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker who knowingly procures by fraudulent representations payment, or an obligation for the payment, of a premium of insurance shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment for not more than one year.

§ 92. **Personal liability of agents.**—An insurance agent shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or in behalf of any company not authorized to do business in this commonwealth.

§ 93 **Broker.**—Whoever, for compensation, not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a person other

than himself, shall be an insurance broker, and no person shall act as such broker, except as provided in section ninety.*

Laws of 1904.

Chap. 240. § 1. **Construction of word "noon."**—The word "noon," occurring in the Massachusetts standard fire insurance policy, shall be construed to be the noon of standard time of the place where the property covered by the policy is situated.

MICHIGAN.

Compiled Laws, 1897.

§ 5126. **Certain acts of certain agents, etc., unlawful.**—It shall not be lawful for any person or persons as agent, solicitor, broker, surveyor, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this state, business for any fire, fire and marine, or marine and inland insurance company or association not incorporated by the laws of this state, or in any other capacity to procure or assist to procure a fire or inland marine policy or policies of insurance in any company or association which is violating the provisions of section two of this act, or whose agent or agents are violating the provisions of section three hereof.†

§ 5180. **When policy not to be void.**—The People of the State of Michigan enact, That no policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach, or where a loss has not occurred during such breach, or by reason of such breach of condition.

§ 5181. **Unoccupied building.**—If a building that is insured, whether intended for occupancy by owner or tenant be or become vacant or unoccupied and so remain for ten days, without the consent of the company endorsed on the policy, such vacancy shall not avoid said policy of insurance.

§ 5182. **Clause added to standard policy to contain what.**—There shall hereafter be inserted in, or by stamp or rider affixed upon, the standard form of insurance policies used in this state, after the clause which contains the conditions for a breach of which without the consent of the company endorsed thereon the policy is declared void, a proviso in substance as follows:

* Section 90 requires license or certificate of authority.

† Sections 2 and 3 prescribe the conditions upon which foreign companies may transact business.

Provided, A loss shall occur on the property insured while such breach of condition continues or such breach of condition is the primary or contributory cause of the loss.

MINNESOTA.

Laws of 1895, Chapter 175.

§ 91. **Agents — Solicitors.**— Whoever for compensation acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such insurance broker save as provided in this section.* * * *

§ 20. **Misrepresentation.**—No oral or written misrepresentation made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive and defraud, or unless the matter misrepresented increase the risk of loss.

§ 52. **Conditions must be stated in full — Warranty.**— In all insurance against loss by fire the conditions of insurance shall be stated in full, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy.

§ 87. **Personal liability of agent.**— An insurance agent shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or in behalf of any company not authorized to do business in this state.

§ 88. **Agents — Who are.**— An insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance by an insurance company shall, for the purpose of receiving the premium therefor be held to be the company's agent, whatever conditions or stipulations may be contained in the policy or contract; such agent or broker knowingly procuring by fraudulent representations payment or an obligation for the payment of a premium of insurance shall be punished by fine of not less than twenty-five dollars nor more than two hundred and fifty dollars, or by imprisonment for not more than one year.

* The balance of the section prescribes license or certificate and fees.

MISSISSIPPI.

Laws of 1902, Chapter 59.

§ 33. **Amount of insurance; three-quarters clause; partial loss.**—No insurance company shall knowingly issue any fire insurance policy upon property within this state for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor for a longer term than five years. When real property or buildings, household or kitchen furniture, insured against loss by fire and situated within this state are totally destroyed by fire, the company shall not be permitted to deny that the property insured was worth, at the time of the issuing of the policy, the full value upon which the insurance was calculated. And in case the policy contains a three-quarter valuation clause, the insurer shall not deny that the amount of the policy was but three-fourths the value at the date of its issuance, and a similar rule shall apply, it matters not what proportion the amount of insurance bears to valuation according to the terms of the policy; but the measure of damages shall be the amount for which the property was insured. In case of partial loss or damage by fire to real property or buildings the measure of damage shall be an amount equal to the damage done the property not to exceed the amount written in the policy. In case of destruction or damage of property by fire where the same is insured against fire, it shall be the duty of the insurance company or companies liable for such loss, within a reasonable time after receiving notice thereof, to furnish to the insured proper blanks upon which to make the required proof of such loss, with full directions as to what proof is required to secure the payment of the policy, and if the insurance company fails to comply with this section, the failure of the insured to make proper proof of loss prior to the suit shall be no defense to a suit upon the policy, and in all cases the insured shall have a reasonable time in which to make such proof after the blanks and directions are received. Every insurance company transacting business in this state shall, upon receiving notice of loss by fire of property in Mississippi, on which it is liable under a policy of insurance, forthwith notify the insurance commissioner thereof, and no insurance upon any such property shall be paid by any company until one week after such notification, except by permission of the insurance commissioner. Any company violating this section may be fined by the insurance commissioner the sum of ten dollars (\$10) for each and every offense, and for refusal to comply with its provisions have its license cancelled

by said commissioner. (Chap. 59, § 33, Laws of 1902, as amended by chap. 79, § 5, Laws of 1904.)

§ 34. **Mortgages protected in order of priority.**—When by an agreement with the assured or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to the mortgagee or mortgagees of the property for their benefit, the company shall, upon satisfactory proof of the rights and title of the parties in accordance with such terms and agreement, pay all mortgages protected by such policy in the order of their priority of claim, as their claims shall appear, not beyond the amount for which the company is liable, and such payments shall be to the extent thereof, payments and satisfaction of the liabilities of the company under such policy.

Mortgage clause.—Each fire insurance policy on buildings taken out by a mortgagor or grantor in a deed of trust shall have attached or shall contain substantially the following mortgagee clause, viz.:

“Loss or damage, if any, under this policy, shall be payable to (here insert name of the party), as mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy, provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy the mortgagee (or trustee) shall, on demand, pay the same; provided also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void. This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right on like notice to cancel this agreement. In case of any other insurance upon the within described prop-

erty this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties, having an insurable interest therein, whether as owner, mortgagee or otherwise. Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all security held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of claim." Provided, nothing in the foregoing prescribed form shall be construed to in any manner modify the provisions of section 5 of this act. (Sec. 34 of chap. 59, Laws 1902, as amended by sec. 7, chap. 79, Laws 1904.)

§ 50. **Agent defined; penalty for fraudulent representation.**—Every person who solicits insurance on behalf of any insurance company, or who takes or transmits, other than for himself, an application for insurance, or a policy of insurance, to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, collect, or transmit any premium of insurance, or make or forward a diagram of any building, or do or perform any other act or thing in the making or consummation of any contract of insurance for or with any such insurance company, other than for himself, or who shall examine into or adjust, or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request or by the employment of the insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract; such person knowingly procuring by fraudulent representations payment or the obligation for the payment of a premium of insurance, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not more than one year.

§ 51. **Personal liability of agent.**—An insurance agent shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or in behalf of any company not authorized to do business in the State.

MISSOURI.

2 Revised Statutes, 1899.

§ 7973. **Construction of warranties of fact, etc.**—That the warranty of any fact or condition hereafter made by any person in his or her application for insurance against loss by fire, tornado or cyclone, which application, or any part thereof, shall thereafter be made a part of a policy of insurance, by being attached thereto, or by being referred to therein, or by being incorporated in such policy, shall, if not material to the risk insured against, be deemed, held and construed as representations only, in any suit brought at law or in equity in any of the courts of this state, upon such policy to enforce payment thereof, on account of loss of or damage to any property insured by such policy.

§ 7974. **Same.**—That the warranty of any fact or condition hereafter incorporated in or made a part of any fire, tornado or cyclone policy of insurance, purporting to be made or assented to by the assured which shall not materially affect the risk insured against, shall be deemed, taken and construed as representations only in all suits at law or in equity brought upon such policy in any of the courts of this state.

§ 7975. **Evasion of preceding sections prohibited.**—No insurance company, corporation or association of persons doing a fire, cyclone or tornado insurance business in this state, shall have the right, power or authority, by contract or otherwise, to contract against or in any manner whatever evade the provisions of sections 7973 and 7974 of this article.

§ 8000. **"Agent," defined — Liabilities.**—Any person or persons in this state who shall receipt for any money on account of or for any contract of insurance made by him or them for any insurance company or association not at the time authorized to do business in this state, or who shall receive or receipt for any money from other persons, to be transmitted to any such insurance company or association, either in or out of this state, for a policy or policies of insurance issued by such company or association, or for any renewal thereof, although the same may not be required by him of them as agents, or who shall make or cause to be made, directly or indirectly, any contract

of insurance for such company or association, shall be deemed to all intents and purposes an agent of such company or association, and shall be subject to all the provisions and regulations and liable to all the penalties provided and fixed by this chapter. Any person who shall be appointed, or who shall act as agent for any insurance company within this state, or who shall, as such agent, solicit applications, deliver policies or renewal receipts and collect premiums thereon, or who shall receive or collect moneys from any source or on any account whatsoever, as such agent, for any insurance company doing business in this state, such person shall be held responsible in a trust or fiduciary capacity to such company for any money so collected or received by him for such company. Any such agent or person who shall embezzle or convert to his own use, or shall take or secrete or otherwise dispose of with intent to embezzle or use, or who shall fraudulently withhold or appropriate, invest or make use of without the consent of such company, or contrary to its instructions, any money belonging to such company which shall have come into his possession, or shall be under his care by reason of such agencies, he shall be deemed by so doing to be guilty of a crime, and, upon conviction thereof, shall be punished in the manner prescribed by law for stealing property of the value of the money so embezzled, converted, taken, used or secreted.

MONTANA.

Civil Code, 1895.

§ 3400. **Insurable interest.**— Any interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify, the insured, is an insurable interest.

§ 3401. **In what may consist.**— An insurable interest in property may consist in:

1. An existing interest;
2. An inchoate interest founded on an existing interest; or,
3. An expectancy, coupled with an existing interest in that out of which the expectancy arises.

§ 3402. **Interest of carrier or depositary.**— A carrier or depositary of any kind has an insurable interest in a thing held by him as such, to the extent of its value.

§ 3403. **Mere expectancies.**— A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable.

§ 3404. **Measure of interest.**— The measure of an insurable interest in property is the extent to which the insured might be damaged by loss or injury thereof.

§ 3405. **Insurance without interest, illegal.**— The sole object of insurance is the indemnity of the insured, and if he has no insurable interest, the contract is void.

§ 3406. **When interest must exist.**— An interest insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the meantime.

§ 3407. **Effect of transfer.**— Except in the cases specified in the next four sections, and in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent until the interest in the thing and the interest in the insurance are vested in the same person.

§ 3408. **Transfer after loss.**— A change of interest in a thing insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss.

§ 3409. A change of interest in one or more of several distinct things, separately insured by one policy, does not avoid the insurance as to the others.

§ 3410. **In case of death of the insured.**— A change of interest, by will or succession, on the death of the insured, does not avoid an insurance; and his interest in the insurance passes to the person taking his interest in the thing insured.

§ 3411. **In the case of transfer between cotenants.**— A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

§ 3412. **Policy, when void.**— Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void.

§ 3420. **Concealment.**— A neglect to communicate that which a party knows, and ought to communicate, is called a concealment.

§ 3421. **Effect of concealment.**— A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.

§ 3422. **What must be disclosed.**— Each party to a contract of insurance must communicate to the other, in good faith, all

facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.

§ 3423. **Matters which need not be communicated without inquiry.**— Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows;
2. Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant;
3. Those of which the other waives communication;
4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and,
5. Those which relate to a risk excepted from the policy, and which are not otherwise material.

§ 3424. **Test of materiality.**— Materiality is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

§ 3425. **Matters which each is bound to know.**— Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry, equally with that of the other, and which may affect either the political or material perils contemplated; and all general usages of trade.

§ 3426. **Waiver of communication.**— The right to information of material facts may be waived, either by the terms of insurance or by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.

§ 3427. **Interest of insured.**— Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by section thirty-four fifty-one.

§ 3428. **Fraudulent warranty.**— An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.

§ 3429. **Matters of opinion.**— Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question.

§ 3430. **Representation.**— A representation may be oral or written.

§ 3431. **When made.**— A representation may be made at the same time with issuing the policy, or before it.

§ 3432. **How interpreted.**— The language of a representation is to be interpreted by the same rules as the language of contracts in general.

§ 3433. **Representation as to future.**— A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation.

§ 3434. **How may affect policy.**— A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty.

§ 3435. **When may be withdrawn.**— A representation may be altered or withdrawn before the insurance is effected but not afterwards.

§ 3436. **Time intended by representation.**— The completion of the contract of insurance is the time to which a representation must be presumed to refer.

§ 3437. **Representing information.**— When a person insured has no personal knowledge of the fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information, in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured, whose duty it is to give the intelligence.

§ 3438. **Falsity.**— A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.

§ 3439. **Effect of falsity.**— If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false.

§ 3440. **Materiality.**— The materiality of a representation is determined by the same rule as the materiality of a concealment.

§ 3441. **Application of provisions of this article.**— The provisions of this article* apply as well to a modification of a contract of insurance as to its original formation.

§ 3451. **What must be specified in a policy.**— A policy of insurance must specify:

1. The parties between whom the contract is made;
2. The rate of premium;
3. The property or life insured;
4. The interest of the insured in property insured, if he is not the absolute owner thereof;

* Sections 3420-3441.

5. The risk insured against; and,

6. The period during which the insurance is to continue.

§ 3452. **Whose interest is covered.**—When the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest.

§ 3453. **Insurance by agent or trustee.**—When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as agent or trustee, or by other general words in the policy.

§ 3454. **Insurance by part owner.**—To render an insurance effected by one partner or part owner applicable to the interest of his copartners or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest.

§ 3455. **General terms.**—When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.

§ 3456. **Successive owners.**—A policy may be so framed that it will inure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured.

§ 3457. **Transfer of the thing insured.**—The mere transfer of a thing insured does not transfer the policy, but suspends it until the same person becomes the owner of both the policy and the thing insured.

§ 3458. **Open and valued policies.**—A policy is either open or valued.

§ 3459. **Open policy.**—An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss.

§ 3460. **Valued policy.**—A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

§ 3461. **Running policy, what.**—A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.

§ 3462. **Effect of receipt.**—An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.

§ 3463. **Agreement not to transfer.**—An agreement, made before a loss, not to transfer the claim of a person insured against the insurer after the loss has happened is void.

§ 3470. **Warranty, express or implied.**—A warranty is either express or implied.

§ 3471. **Form.**—No particular form of words is necessary to create a warranty.

§ 3472. **Warranty must be in policy.**—Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it.

§ 3473. **Past, present, and future warranties.**—A warranty may relate to the past, the present, the future, or to any or all of these.

§ 3474. **Warranty as to past or present.**—A statement in a policy, of matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof.

§ 3475. **Warranty as to the future.**—A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place.

§ 3476. **Performance excused.**—When, before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, or performance becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy.

§ 3477. **What acts avoid the policy.**—The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind.

§ 3478. **Policy may provide for avoidance.**—A policy may declare that a violation of specified provisions shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.

§ 3479. **Breach without fraud.**—A breach of warranty, without fraud, merely exonerates the insurer from the time that it occurs, or where it is broken in its inception, prevents the policy from attaching to the risk.

§ 3490. **When premium is earned.**—An insurer is entitled to payment of the premium as soon as the thing insured is exposed to the peril insured against.

§ 3491. **Return of premium.**—A person insured is entitled to a return of premium as follows:

1. To the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against;

2. Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.

§ 3492. **When return not allowed.**—If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned.

§ 3493. **Return for fraud.**—A person insured is entitled to a return of the premium when the contract is voidable, on account of the fraud or misrepresentation of the insurer, or on account of facts of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.

§ 3520. **Double insurance.**—A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest.

§ 3530. **Reinsurance.**—A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.

§ 3531. **Disclosures required.**—Where an insurer obtains reinsurance he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk.

§ 3532. **Reinsurance presumed to be against liability.**—A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage.

§ 3533. **Original insured has no interest.**—The original insured has no interest in a contract of reinsurance.

§ 3550. **Alteration increasing risk.**—An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.

§ 3551. **Alteration not increasing risk.**—An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

§ 3552. **Acts of the insured.**—A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss.

NEBRASKA.

Compiled Statutes, 1901.

1683. **Agents.**— Any person or firm in this state who shall receive or receipt for any money, on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall receive or receipt for money from other persons, to be transmitted to any such company or individual aforesaid, for a policy or policies of insurance or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise, directly or indirectly, make or cause to be made any contract or contracts of insurance, for or on account of such company aforesaid, shall be deemed to all intents and purposes an agent or agents of such company, and shall be subject and liable to all the provisions of this chapter.

3450. **Cancelling policies.**— Any person, company, association, or corporation transacting the business of fire, or fire, wind, storm, and tornado insurance, in this state, shall cancel any policy of insurance hereafter issued or renewed, at any time, by request of the party insured, or his legal representative, and shall return to the said party, or his representative, as aforesaid, the net amount of premium received by the company, after deducting the actual compensation of the agent or solicitor for securing the issue of said policy, and also deducting the customary short-rate premium for the expired time of the full term for which said policy was issued or renewed, any thing in the policy to the contrary notwithstanding.

3453f. **Unauthorized insurance — Liability.**— Any company, corporation, association, partnership or persons who shall solicit or place insurance in a fire insurance company, corporation, association or partnership not authorized to do or transact business in this state shall, in the event of the failure of such unauthorized company, corporation, association or partnership to pay any claim or loss within the policy issued, be liable to the insured for the amount thereof to the extent that such company, corporation, association or partnership would have been liable.

NEW YORK.

2 Birdseye's Statutes, 1901, Page 1862.

(Insurance Law.)

§ 122. **Payment of return premiums on cancellation of policy.**— Any corporation, person, company or association trans-

acting the business of fire insurance in this state shall cancel any policy of insurance upon the request of the insured or his legal representatives, and shall return to him or to such representative the amount of premium paid, less the customary short-rate premium for the expired time of the full term for which the policy has been issued or renewed, notwithstanding anything in the policy to the contrary. Where the laws of any state permit corporations organized under its laws to cancel policies of insurance upon different terms than herein set forth, corporations organized under the laws of this state may cancel policies upon risks in any such state upon the same terms as are provided for corporations organized under its laws.

NORTH CAROLINA.

Public Laws of 1899, Chapter 54.

§ 42. **Conditions must be stated in full.**—In all insurance against loss by fire the conditions of insurance shall be stated in full, and the rules and by-laws of the company shall not be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy.

§ 69. **Agent as to premium.**—An insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance company shall, for the purpose of receiving the premium therefor, be held to be the company's agent, whatever conditions or stipulations may be contained in the policy or contract; such agent or broker knowingly procuring by fraudulent representations payment, or the obligation for the payment of a premium of insurance, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or be imprisoned for not more than one year.

§ 70. **Agents personally liable.**—An insurance agent shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or in behalf of any company not authorized to do business in the state.

NORTH DAKOTA.

Revised Codes, 1899.

§ 4442. **Insurable interest.**—Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest or create a liability against him may be insured against, subject to the provisions of this chapter, with the exception of an insurance for or against the drawing

of any lottery or for or against any chance or ticket in a lottery drawing a prize.

§ 4450. **Insurable interest.**—Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

§ 4451. **Classified.**—An insurable interest in property may consist in:

1. An existing interest;
2. An inchoate interest founded on an existing interest; or,
3. An expectancy, coupled with an existing interest in that out of which the expectancy arises.

§ 4452. **Carrier or depositary.**—A carrier or depositary of any kind has an insurable interest in a thing held by him as such, to the extent of its value.

§ 4453. **Contingent or expectant.**—A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable.

§ 4454. **Measure of interest.**—The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof.

§ 4455. **Insurance without interest.**—The sole object of insurance is the indemnity of the insured, and if he has no insurable interest, the contract is void.

§ 4456. **When interest must exist.**—An interest insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the meantime.

§ 4457. **Change in interest.**—Except in the cases specified in the next four sections, and in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance suspends the insurance to an equivalent extent until the interest in the thing and the interest in the insurance are vested in the same person.

§ 4458. **Change after loss.**—A change of interest in a thing insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss.

§ 4459. **Change in distinct things.**—A change of interest in one or more of several distinct things, insured by one policy, does not avoid the insurance as to the others.

§ 4460. **Incumbrance or reinsurance of one of several things.**—The procurement of any other contract of insurance upon or the incumbrance of one or more of several distinct things in-

sured by one policy does not render void any insurance upon the things not covered by such other contract of insurance or incumbrance; but in case of loss or damage such an amount shall be deducted from the insurance as the value of property so incumbered or doubly insured bears to the value of all the property covered by the policy. Any agreement made to waive the provisions of this or the preceding section is void.

§ 4461. **Change by death.**—A change of interest, by will or succession, on the death of the insured, does not avoid an insurance; and his interest in the insurance passes to the person taking his interest in the thing insured.

§ 4462. **Change among joint owners.**—A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

§ 4463. **Policy, when void.**—Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void.

§ 4464. **Concealment.**—A neglect to communicate that which a party knows, and ought to communicate, is called a concealment.

§ 4465. **Rescission.**—A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.

§ 4466. **Mutual disclosure.**—Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.

§ 4467. **What not bound to disclose.**—Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other.

1. Those which the other knows;
2. Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant;
3. Those of which the other waives communication;
4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and,
5. Those which relate to a risk excepted from the policy, and which are not otherwise material.

§ 4468. **How materiality determined.**—Materiality is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

§ 4469. **Presumption of knowledge.**—Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry, equally with that of the other, and which may affect either the political or material perils contemplated; and all general usages of trade.

§ 4470. **Waiver of information.**—The right to information of material facts may be waived, either by the terms of insurance or by neglect to make inquiries as to such facts, when they are distinctly implied in other facts of which information is communicated.

§ 4471. **Information as to interest.**—Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by section forty-four eighty-eight.

§ 4472. **Rescission for fraudulent concealment.**—An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.

§ 4473. **Matters of opinion.**—Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question.

§ 4474. **Representation.**—A representation may be oral or written.

§ 4475. **When made.**—A representation may be made at the same time with issuing the policy, or before it.

§ 4476. **Rules of interpretation.**—The language of a representation is to be interpreted by the same rules as the language of contracts in general.

§ 4477. **What deemed promise.**—A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation.

§ 4478. **Cannot qualify — May warranty.**—A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty.

§ 4479. **When may be withdrawn.**—A representation may be altered or withdrawn before the insurance is effected, but not afterwards.

§ 4480. **Time to which refers.**—The completion of the contract of insurance is the time to which a representation must be presumed to refer.

§ 4481. **On information and belief.**—When a person insured has no personal knowledge of a fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information, in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured, whose duty it is to give the intelligence.

§ 4482. **When deemed false.**—A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.

§ 4483. **Effect of falsity.**—If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false.

§ 4484. **How materiality determined.**—The materiality of a representation is determined by the same rule as the materiality of a concealment.

§ 4485. **When not material.**—No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss.

§ 4486. **Modification, rescission.**—The provisions of this article* apply as well to a modification of a contract of insurance as to its original formation. Whenever a right to rescind a contract of insurance is given to the insured by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract.

§ 4488. **What must be specified in policy.**—A policy of insurance must specify:

1. The parties between whom the contract is made;
2. The rate of premium;
3. The property or life insured;
4. The interest of the insured in property insured, if he is not the absolute owner thereof;
5. The risk insured against; and,
6. The period during which the insurance is to continue.

§ 4499. **Effect of receipt for premium.**—An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwith-

* Sections 4464–4486.

standing any stipulation therein that it shall not be binding until the premium is actually paid.

§ 4500. **Agreement not to transfer.**—An agreement, made before a loss, not to transfer the claim of a person insured against the insurer after the loss has happened is void.

§ 4501. **Holder may surrender for cancellation.**—The holder of any policy of insurance against loss or damage to property by fire or other casualty hereafter issued by any insurance company doing business in this state may, notwithstanding any provision thereof or contract to the contrary, at any time surrender the same for cancellation; and upon such surrender the company issuing such policy shall retain or receive such proportion and not more of the premium paid or agreed to be paid as corresponds with the usual short rates upon term policies as adopted and maintained by the Minnesota and Dakota fire underwriters' union of St. Paul, Minnesota, for the time the policy remained in force.

§ 4502. **Notice necessary to forfeit.**—No such policy of insurance shall by virtue of any condition or provision thereof be forfeited, suspended or impaired for nonpayment of any note or obligation taken for the premium, or any part thereof, unless the insurer shall, not less than thirty days prior to the maturity of such premium, note or obligation, mail, postage prepaid, to the assured at his usual post office a notice, stating:

1. The date when such note or obligation will become due.
2. The amount of principal and interest that will then be due.

3. The effect upon the policy of nonpayment.

4. Such notice shall further inform the assured of his right at his own election either to pay in full and keep the policy in full force, or to terminate the insurance by surrendering the policy and paying such part of the whole premium as it shall have earned and must further state the amount which the assured is lawfully required to pay, or which on account of previous payment may be due him in case of his election to terminate the insurance on the day of the maturity of the premium, note or obligation.

§ 4503. **Warranty, express or implied.**—A warranty is either express or implied.

§ 4504. **Form.**—No particular form of words is necessary to create a warranty.

§ 4505. **Express warranty must be written.**—Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it.

§ 4506. **To what time may relate.**—A warranty may relate to the past, the present, the future, or to any or all of these.

§ 4507. **What express warranty.**—A statement in a policy, of matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof.

§ 4508. **Statement of intention a warranty.**—A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place.

§ 4509. **As to future, when need not be fulfilled.**—When before the time arrives for the performance of a warranty relating to the future a loss insured against happens or performance becomes unlawful at the place of the contract or impossible, the omission to fulfill the warranty does not avoid the policy.

§ 4510. **Rescission for violation of warranty.**—The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind.

§ 4511. **What avoids policy.**—A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.

§ 4512. **Breach without fraud.**—A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or when it is broken in its inception, prevents the policy from attaching to the risk.

§ 4513. **When premium payable.**—An insurer is entitled to the payment of the premium as soon as the thing insured is exposed to the peril insured against.

§ 4514. **When insured entitled to return.**—A person insured is entitled to a return of premium as follows:

1. To the whole of the premium, if no part of his interest in the thing insured is exposed to any of the perils insured against;

2. When the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.

§ 4515. **Premium defined.**—The term premium within the meaning of sections 4501, 4502 and 4514 includes policy fees in excess of two dollars on any one policy and all other sums of money paid or agreed to be paid in consideration of the policy of insurance.

§ 4516. **Return when insurance voidable.**—A person insured is entitled to a return of the premium when the contract is voidable, on account of the fraud or misrepresentation of the insurer, or on account of facts of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.

§ 4517. **Not entitled to return.**—If a peril insured against has existed and the insurer has been liable for any period, however short, the insured is not entitled to a return of premium so far as that particular risk is concerned, unless the insurance was for a definite period of time, in which case he is entitled to a proportionate return under sections 4501 and 4514.

§ 4518. **Return in over insurance by several.**—In case of an over insurance by several insurers the insured is entitled to a ratable return of the premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk.

§ 4519. **Contribution to return.**—When an over insurance is effected by simultaneous policies the insurers contribute to the premium to be returned in proportion to the amount insured by their respective policies.

§ 4520. **Same.**—When an over insurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them and in proportion as the sum for which the premium was paid exceeds the amount for which on account of prior insurance they could be made liable.

§ 4531. **Double insurance.**—A double insurance exists when the same person is insured by several insurers separately in respect to the same subject and interest.

§ 4533. **Reinsurance, what.**—A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.

§ 4534. **Disclosure required.**—When an insurer obtains reinsurance he must communicate all the representations of the original insurer,* and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk.

§ 4535. **Contract of indemnity.**—A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage.

§ 4536. **Original insured no interest.**—The original insured has no interest in a contract of reinsurance.

* So in original as printed.

§ 4604. **Rescission for alteration.**— An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.

§ 4605. **Alteration not increasing risk.**— An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

§ 4606. **When contract unaffected though risk increased.**— A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss.

OHIO.

2 Bates' Annotated Statutes, 1902.

§ 3644. **Agents.**— A person who solicits insurance and procures the application therefor, shall be held to be the agent of the party, company or association thereafter issuing a policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding. (As amended by laws of 1904, No. 361, p. 160.)

§ 3664. **Insured may require fire policy to be canceled.**— Any fire insurance company doing business under the laws of this state which hereafter issues policies of insurance covering any property located in this state, and on such policies receives from the persons insured either cash payments of premium, or notes subject to assessment for payment of losses, or notes for the installments of premium, shall be required to insert in every policy so issued an obligation to cancel the policy at any time, upon the written request of the person insured on conditions as provided in the following five* sections.

§ 3665. **Rates for cancellation of cash policies.**— When a policy issued on the cash plan is canceled, in accordance with the provisions of the preceding section, the companies so issuing may retain customary short rates, as now established and charged by companies doing a cash business, for the time the policy has been in force, and return to the insured the unearned premium on the policy for unexpired time.

* The following four sections relate to mutual companies, rates when premium paid in installments, premium notes not negotiable, and enforcement of provisions by superintendent of insurance.

OKLAHOMA.

1 Revised Statutes of 1903.

§ 3200. **Policy to contain copy of application.**— All insurance policies issued in this Territory under this act, must be accompanied by a copy of the application for insurance upon which the policy was issued, and such copy shall be evidence in favor of the assured of the matter in his application contained.

§ 3201. **Alteration of use; increasing the risk.**— An alteration in the use or condition of a thing insured, from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk entitles the insurer to rescind a contract of fire insurance.

§ 3202. **Same; not increasing the risk.**— An alteration in the use or condition of a thing insured, from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

§ 3203. **Act of insured not increasing risk.**— A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk, and is the cause of a loss.

PENNSYLVANIA.

1 Pepper and Lewis' Digest, 1894, Title "Insurance."

§ 68. **Copy of application to be attached to policy.**— All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence in any controversy between the parties to, or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties.

§ 70. **Copy of lost policy to be furnished.**— Whenever any policy of insurance upon any property, real or personal, granted

by any body corporate or politic, shall have been lost or destroyed, such body corporate or politic shall, on proof of the loss or destruction of the same, in the manner hereinafter provided, furnish to the person or persons, whose policy has been so lost or destroyed, a copy of the same, together with the transfers which have been approved and recorded on the books of such body corporate, if any, which may have been made by the original or any subsequent grantee of such policy to the person or persons having the same, at the time of the loss or destruction thereof; the copy so made to be as effectual for the security and indemnification of the person or persons holding the same, as the original, and subject like it to transfer to any person purchasing the property insured.

§ 71. **Proceedings in case of lost policy.**— On the application of any person or persons to the court of common pleas of the county in which the property has been insured, setting forth the loss or destruction of the policy of insurance, on oath or affirmation, together with a description of the property, the amount for which it was insured, the person or persons to whom granted, if practicable, together with the mesne transfers thereof, the court shall grant a rule on the body corporate or politic which granted such policy of insurance, commanding such body corporate or politic to appear before said court, on a day certain, not less than twenty days from the service of said rule, to show cause why a copy of such policy of insurance should not be supplied, in pursuance of the provisions of the first section of this act; and on the default of such body corporate or politic to appear and show cause why such copy as aforesaid should not be supplied, the court shall issue a mandate to such body corporate or politic, to furnish such copy in ten days after service of the same; and on the neglect or refusal of such body corporate or politic, to furnish a copy as aforesaid, the court, on due proof of the service of such mandate, and the neglect or refusal of such body corporate or politic to furnish such copy, shall direct a judgment to be entered by the prothonotary in favor of the person or persons making the application against the said body corporate or politic, for the sum for which the said policy of insurance was granted, which said judgment shall stand for security of the plaintiff or plaintiffs, for such time as the policy of insurance itself would have done, and for the like purposes; and the costs of the proceedings shall be paid by the defendant; and the officers rendering services shall receive the like fees as are now allowed by law for similar services.

§ 125. **Definition of insurance broker.**— Whoever acts or aids in any manner in negotiating contracts of insurance, or re-

insurance, or placing risks, or effecting insurance or re-insurance, for any person other than himself, receiving compensation therefor, and is not the officer, member or agent of the company or companies in which such insurance is effected, shall be deemed to be an insurance broker. (Balance of the statute prescribes the obtaining of certificate by brokers, and penalties.)

§ 130. **Personal liability of agents of foreign companies.**—The agent of any insurance company of any other state or government, which does not comply with the laws of this commonwealth, shall be personally liable on all contracts of insurance made by or through him, directly or indirectly, for or in behalf of any such company.

RHODE ISLAND.

Revised Statutes, 1896.

§ 10. **Who is to be deemed an agent of a foreign insurance company.**—Every person who acts or aids in any manner in negotiating contracts of insurance or re-insurance, or placing risks, or effecting insurance or re-insurance, for any person other than himself, and receiving compensation therefor, and every person who shall so far represent any insurance company, established in any other state or country, as to receive or transmit proposals for insurance, or to receive for delivery policies founded on proposals forwarded from this state, or otherwise to procure insurance to be effected by such company for persons residing in this state, shall be deemed and taken to be acting as agent for and undertaking to make insurance as agent for and in behalf of such company, and shall be subject to the restrictions and liable to the penalties herein made applicable to agents of such companies.

Laws 1896, September Session, Chapter 416.

§ 1 (p. 5). **Insurance brokers, who deemed to be.**—Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such broker save as provided in this section. (Balance of the Act prescribes the obtaining of a license and penalties.)

SOUTH CAROLINA.

1 Civil Code, 1902.

§ 1810. **Who to be considered agents of foreign insurance companies.**—Any person who solicits insurance in behalf of any insurance company not organized under or incorporated by the laws of this State, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine and inspect any risk, or receive, collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or the consummating of any contract of insurance for or with any such company, other than for himself, or who shall examine into and adjust, or aid in adjusting, any loss for or in behalf of any such insurance company, whether any such acts shall be done at the instance or request or by the employment of such insurance company, shall be held to be acting as the agent of the company for which this act is done or the risk is taken.

SOUTH DAKOTA.

Revised Codes, 1903.

§ 1794. **What may be insured.**—Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter, with the exception of an insurance for or against the drawing of any lottery, or for or against any chance or ticket in a lottery drawing a prize.

§ 1802. **Insurable interest.**—Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

§ 1803. **Insurable interest classified.**—An insurable interest in property may consist in:

1. An existing interest;
2. An inchoate interest founded on an existing interest; or,
3. An expectancy, coupled with an existing interest in that out of which the expectancy arises.

§ 1804. **Carrier or depositary.**—A carrier or depositary of any kind has an insurable interest in a thing held by him as such, to the extent of its value.

§ 1805. **Contingent interests.**—A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable.

§ 1806. **Measure of interest.**—The measure of an insurable interest in property is the extent to which the insured might be damaged by loss or injury thereof.

§ 1807. **Insurance without interest.**—The sole object of insurance is the indemnity of the insured, and if he has no insurable interest, the contract is void.

§ 1808. **When interest must exist.**—An interest insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the meantime.

§ 1809. **Effect of transfer.**—Except in the cases specified in the next four sections, and in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent until the interest in the thing and the interest in the insurance are vested in the same person.

§ 1810. **Transfer after loss.**—A change of interest in a thing insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss.

§ 1811. A change of interest in one or more of several distinct things, separately insured by one policy, does not avoid the insurance as to the others.

§ 1812. **Change by death.**—A change of interest, by will or succession, on the death of the insured, does not avoid an insurance; and his interest in the insurance passes to the person taking his interest in the thing insured.

§ 1813. **Transfer by joint owners.**—A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

§ 1814. **Policy, when void.**—Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void.

§ 1815. **Concealment.**—A neglect to communicate that which a party knows, and ought to communicate, is called a concealment.

§ 1816. **Effect of concealment.**—A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.

§ 1817. **Mutual disclosures.**—Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.

§ 1818. **Not bound to disclose.**—Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other.

1. Those which the other knows;

2. Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant;

3. Those of which the other waives communication;

4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and,

5. Those which relate to a risk excepted from the policy, and which are not otherwise material.

§ 1819. **Legal construction.**—Materiality is to be determined, not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

§ 1820. **Presumption as to knowledge.**—Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry, equally with that of the other, and which may affect either the political or material perils contemplated; and all general usages of trade.

§ 1821. **Waiver of information.**—The right to information of material facts may be waived, either by the terms of insurance or by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.

§ 1822. **Information as to interest.**—Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by section eighteen hundred and thirty-eight.

§ 1823. **Fraud by insured.**—An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.

§ 1824. **Matters of opinion.**—Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question.

§ 1825. **Representation.**—A representation may be oral or written.

§ 1826. **When made.**—A representation may be made at the same time with issuing the policy, or before it.

§ 1827. **Interpretation.**—The language of a representation is to be interpreted by the same rules as the language of contracts in general.

§ 1828. **Representation as to future.**—A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation.

§ 1829. **May qualify implied warranty.**—A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty.

§ 1830. **Representation withdrawn.**—A representation may be altered or withdrawn before the insurance is effected, but not afterwards.

§ 1831. **Time to which representation refers.**—The completion of the contract of insurance is the time to which a representation must be presumed to refer.

§ 1832. **Information and belief.**—When a person insured has no personal knowledge of a fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information, in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured, whose duty it is to give the intelligence.

§ 1833. **Falsity of representation.**—A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.

§ 1834. **Effect of falsity.**—If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false.

§ 1835. **Materiality.**—The materiality of a representation is determined by the same rule as the materiality of a concealment.

§ 1836. **Modification — Rescission.**—The provisions of this article* apply as well to a modification of a contract of insurance as to its original formation. Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract.

§ 1838. **Specification of policy.**—A policy of insurance must specify:

1. The parties between whom the contract is made;

* Sections 1815–1836.

2. The rate of premium;
3. The property or life insured;
4. The interest of the insured in property insured, if he is not the absolute owner thereof;
5. The risk insured against; and,
6. The period during which the insurance is to continue.

§ 1839. **Name of person insured.**—When the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest.

§ 1840. **Insurance by agent or trustee.**—When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as agent or trustee, or by other general words in the policy.

§ 1841. **Terms applicable to joint and common interest.**—To render an insurance effected by one partner or part owner applicable to the interest of his copartners or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest.

§ 1842. **Specific person.**—When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.

§ 1843. **Policy may run to whomsoever.**—A policy may be so framed that it will inure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured.

§ 1844. **Transfer of thing insured.**—The mere transfer of a thing insured does not transfer the policy, but suspends it until the same person becomes the owner of both the policy and the thing insured.

§ 1845. **Classes of policies.**—A policy is either open or valued.

§ 1846. **Open policy.**—An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss.

§ 1847. **Valued policy.**—A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

§ 1848. **Successive insurance.**—A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.

§ 1849. **Receipt in policy.**—An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.

§ 1850. **Agreement not to transfer.**—An agreement, made before a loss, not to transfer the claim of a person insured against the insurer after the loss has happened is void.

§ 1851. **Warranty, classified.**—A warranty is either express or implied.

§ 1852. **Form.**—No particular form of words is necessary to create a warranty.

§ 1853. **Express warranty must be written.**—Every express warranty, made at or before the execution of a policy, must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it.

§ 1854. **Time of warranty.**—A warranty may relate to the past, present, future, or to any or all of these.

§ 1855. **Construction of statement in policy.**—A statement in a policy, of matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof.

§ 1856. **Statement in policy as to intention.**—A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place.

§ 1857. **Omission does not void policy.**—When, before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, or performance becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy.

§ 1858. **When entitled to rescission.**—The violation of a material warranty, or other material provisions of a policy, on the part of either party thereto, entitles the other to rescind.

§ 1859. **What avoids policy.**—A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.

§ 1860. **Breach without fraud.**—A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception, prevents the policy from attaching to the risk.

§ 1861. **Premium payable when.**—An insurer is entitled to payment of the premium as soon as the thing insured is exposed to the peril insured against.

§ 1862. **Return of premium.**—A person insured is entitled to a return of premium as follows:

1. To the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against;

2. Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.

§ 1863. **Same.**—A person insured is entitled to a return of the premium when the contract is voidable, on account of the fraud or misrepresentation of the insurer, or on account of facts of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.

§ 1864. **When not entitled.**—If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned.

§ 1865. **Return in ratio.**—In case of an over insurance by several insurers, the insurer is entitled to a ratable return of the premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk.

§ 1866. **Contributions on over insurance.**—When an over insurance is effected by simultaneous policies, the insurers contribute to the premium to be returned, in proportion to the amount insured by their respective policies.

§ 1867. **Same.**—When an over insurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them, and in proportion as the sum for which the premium was paid exceeds the amount for which on account of prior insurance they could be made liable.

§ 1877. **Double insurance.**—A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest.

§ 1879. **Reinsurance.**—A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.

§ 1880. **Disclosures required.**—Where an insurer obtains reinsurance he must communicate all the representations of the original insurer* and also all the knowledge and information

* So printed in statutes.

he possesses, whether previously or subsequently acquired, which are material to the risk.

§ 1881. **Nature of reinsurance.**—A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage.

§ 1882. **Original insured no interest.**—The original insured has no interest in a contract of reinsurance.

§ 1950. **Alteration of use.**—An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.

§ 1951. **Same not increasing risk.**—An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

§ 1952. **Act of the insured.**—A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss.

TENNESSEE.

Code of 1896.

§ 3306. **Misrepresentation not to avoid policy, when.**—No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material or defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss. (Laws 1895, chap. 160, § 22.)

§ 3316. **Agent's liability on unlawfully issued policies.**—An agent or person shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or in behalf of any insurance company not authorized to do business in this state.

TEXAS.

2 Sayles Civil Statutes, 1897.

Art. 3061. **Insurance unlawful unless authorized by commissioner of insurance.**—It shall not be lawful for any person to act within this state, as agent or otherwise, in soliciting or

receiving applications for insurance of any kind whatever, or in any manner to aid in the transaction of the business of any insurance company incorporated in this state or out of it, without first procuring a certificate of authority from the commissioner of agriculture, insurance statistics and history.

Art. 3093. **Who are agents.**—Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other state or foreign government, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, or collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into, or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done, or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter; provided, that the provisions of this chapter shall not apply to citizens of this state who arbitrate in the adjustment of losses between the insurers and the insured, nor to the adjustment of particular or general average losses of vessels or cargoes by marine adjusters who have paid an occupation tax of two hundred dollars for the year in which the adjustment is made; provided further, that the provisions of this chapter shall not apply to practicing attorneys at law in the state of Texas, acting in the regular transaction of their business as such attorneys at law, and who are not local agents nor acting as adjusters for any insurance company.

Art. 3095. **Penalty, etc.**—Any person who shall do any of the acts mentioned in article 3093 for or on behalf of any insurance company without such company has first complied with the requirements of the laws of this state, shall be personally liable to the holder of any policy of insurance in respect of which such act was done for any loss covered by the same.

VERMONT.

Statutes, 1894.

§ 4199. **Foreign companies not to do business, unless, etc.**— Foreign fire insurance companies are prohibited from taking insurance in this state, unless such companies are responsible by the laws of the state in which they are situated, or by their acts of incorporation, or by a proviso to that effect in their policies of insurance, for the acts and neglect of their agents as between said companies and the insured, and as between said companies and the applicants for insurance therein.

§ 4200. **Penalty for acting as agent in certain cases.**— If a person takes an application or makes a survey intending to effect insurance on property in a foreign fire insurance company, said company not being liable for the acts and neglects of such persons as specified in the preceding section, said person shall be fined not less than seven dollars, one-half to go to the person prosecuting the same, and one-half to the town where the offense is committed.

§ 4201. **Application taken by agent, deemed act of company.**— When application for fire insurance is taken or transmitted by or through a local or traveling agent of a fire insurance company, or a person acting under the employment of an agent of such company, it shall be deemed to be the act of the company; and in questions arising as to the facts stated in such application, such agent or sub-agent shall be deemed to be the agent of the insurers and not of the insured.

VIRGINIA.

2 Code, 1904.

§ 3252. **When failure to perform a condition of a policy, or the violation of a provision thereof, not to avail as a defence.**

— In any action against an insurance company or other insurer, founded on a policy of insurance issued after the first day of July, eighteen hundred and seventy-eight, no failure to perform any condition of the policy, nor violation of any restrictive provision thereof, shall be valid defence to such action unless it appears that such condition or restrictive provision is printed in type as large as or larger than that commonly known as long primer type, or is written with pen and ink in or on the policy.

§ 3344a. **Evidence in suits upon insurance policy, as to immaterial allegations in such policy.**— No answer to any interrogatories made by an applicant for a policy of insurance shall

bar the right to recover upon any policy issued upon such application, by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was wilfully false or fraudulently made or that it was material.

WASHINGTON.

Laws of 1899, Chapter CXLIV.

§ 9. **Agents.**— Any person through whom any insurance company writing insurance upon any property in this state shall deliver a policy of insurance shall be deemed the agent of such company as to all transactions relating to such insurance had between such person and the insured named in the policy, prior to and at the delivery thereof.

WISCONSIN.

1 Statutes of 1898.

§ 1945a. **Application attached to policy.**— All fire insurance corporations, except mutual fire insurance corporations organized under the laws of this state, shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon a true copy of any application or representations of the assured, which by the terms of such policy are made a part thereof or of the contract of insurance or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but, if any corporation neglect to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving such application or representations or any part thereof, or the falsity thereof or any part thereof in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover, either to plead or prove such application or representations, but may do so at his option. (As amended Laws 1905, chap. 37.)

§ 1945e. **Business done through agents; penalty.**— No fire insurance company not incorporated under the laws of this state shall write or cause to be written any policy on property herein except through its resident agent duly authorized by the commissioner of insurance. Any company or person who shall solicit or place insurance in a fire insurance company not authorized to do business in this state shall, in the event of the failure of such unauthorized company to pay any claim or loss within

the policy issued, be liable to the insured for the amount thereof to the extent that such company would have been liable.* * * *

§ 1946d. **Cancellation of policy.**—Any company, association or corporation transacting the business of insuring property against loss or damage from any cause shall, except as is otherwise provided by any provision applicable to any class of insurance companies, cancel any policy at any time, by request of the party insured or his assignee, and return to said party the amount of premium paid less the customary short-rate premium for the expired portion of the full term the policy has been issued.

§ 1977. **Who are agents.**—Whoever solicits insurance on behalf of any insurance corporation or person desiring insurance of any kind, or transmits an application for or a policy of insurance, other than for himself, to or from any such corporation, or who makes any contract for insurance, or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation, or advertises to do any such thing, shall be held to be an agent of such corporation to all intents and purposes unless it can be shown that he receives no compensation for such services. This section shall not apply to fraternal assessment orders or societies.

* Balance of section prescribes penalties in revocation or suspension of license, etc.

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